APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

IN THE MATTER OF:
INNKEEPERS OF NEW CASTLE, INC.,

Debtor,

NO. 81-1037
APPEAL OF:
ROBERT J. MALEY,

Claimant-Appellant
Cross-Appellee,

IN THE MATTER OF:
INNKEEPERS OF NEW CASTLE, INC.,

Debtor,

NO. 81-1109
APPEAL OF:
ALEXANDER HAMILTON LIFE INSURANCE
COMPANY OF AMERICA,

Cross-Appellant.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 76-B-22—James E. Noland, *Judge.*

ARGUED JUNE 12, 1981—DECIDED FEBRUARY 10, 1982

Before CUMMINGS, *Chief Judge;* FAIRCHILD, *Senior Circuit Judge;* and EAST, *Senior District Judge.**

EAST, *Senior District Judge.* Claimant-appellant Robert J. Maley (Maley) appeals an order of the District Court entered in the above bankruptcy matter on December 11, 1980, which awarded attorney fees to Maley and another attorney in the undivided amount of $325,000, plus expenses, for services rendered in the defense of an action by the State of Indiana (State) seeking to condemn land and highway access owned by Innkeepers of New Castle, Inc. (Innkeepers).

Maley had entered into a contingent fee contract for his legal services with Innkeepers, but shortly before the condemnation action came to trial in state court, Innkeepers filed a petition in the District Court seeking rearrangement of its financial affairs pursuant to Chapter 11 of the Bankruptcy Act of 1898, 11 U.S.C. §§ 1, *et seq.* (1976) (Bankruptcy Act).[1] Thereafter Maley and the other attorney, Jim Cordes, successfully pursued the state court defense and recovered a substantial award for Innkeepers. Both Maley and Cordes perfected liens on the judgment in accordance with Indiana law.

The District Court refused either to give effect to the contingent fee contract or to enforce the liens, and instead set the attorney fees awards on a "reasonable fee" basis in accordance with bankruptcy law. We reverse in part, affirm in part, and remand.

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation

[1]All United States Code and Bankruptcy Rules citations are to the Bankruptcy Act of 1898, as amended, and the rules promulgated thereunder, all of which were in effect at the time the bankruptcy proceedings were commenced. *See* Act of Nov. 6, 1978, Pub. L. No. 95-598, §402, 92 Stat. 2682 (reprinted as preface to 11 U.S.C. §101 (1979)).

BACKGROUND

The pertinent facts are undisputed and are best narrated in the following chronological order:

In July of 1966, Andrew and Lucille Tabor, husband and wife, were the owners of record of a 33.96 acre tract of land in Indiana which was bordered on the west for approximately 400 feet by State Road #3 and on the south by a public road which intersected with State Road #3. At that time, Andrew Tabor was the owner of the franchise for a Holiday Inn Motel which he contemplated constructing on a part of the 33.96 acre tract.

On July 8, 1966, Andrew Tabor, acting in the name of the Holiday Inn, applied to the Indiana State Highway Commission for a permit to construct a driveway entrance and exit onto State Road #3 for the use of the then proposed motel. The Commission's Permit Engineer responded with a letter to Andrew Tabor dated November 29, 1966 which purported to deny the driveway application because of a proposed widening and limitation of access to State Road #3 at that location. However, at that time no final plans had been formulated for any modification of State Road #3.

On February 24, 1967, Innkeepers of New Castle, Inc. was incorporated under the laws of Indiana for the purpose of owning and operating a Holiday Inn Motel. The principal stockholders were the Tabors who owned seventy-eight percent of the outstanding stock. Andrew Tabor was the president-treasurer, and Lucille Tabor was the vice president.

The Highway Commission eventually formulated its plans to modify State Road #3. On April 7, 1969, following fruitless negotiations, the State notified the Tabors by letter that it intended to condemn a narrow strip of land and all rights of access along the entire length of the western edge of the Tabors' tract bordering State Road #3. The letter included an offer of $7,731 in compensation for

the proposed condemnation. No separate offer of compensation was ever made to Innkeepers.

On May 31, 1969, the Tabors deeded to Innkeepers 4.82 acres out of their larger tract. Innkeepers' new tract had a frontage along the east side of State Road #3 of approximately 350 feet. The part of the original tract retained by the Tabors assumed the form of a lazy-U, fronting State Road #3 on the north and south legs of the U. The deed to Innkeepers was recorded on June 2, 1969. Financing for the Holiday Inn was obtained by Innkeepers, and construction was substantially completed by October of 1969.

On December 19, 1969, the State filed its condemnation action in the Circuit Court of Henry County. Although the State sought to condemn the entire 400 feet of frontage on State Road #3, including the frontage within the tract previously deeded to Innkeepers, and although the condemnation action was intended to have the effect of depriving Innkeepers' Holiday Inn Motel of access to the road, Innkeepers was not named as a party to the action.

The Tabors retained Maley to represent them and orally agreed to a contingent fee contract at a rate of fifty percent of any net gain received above the State's original offer. This contract, however, was not reduced to writing until May 5, 1971.

Maley filed an appearance on behalf of the Tabors in January of 1970. In August of 1970, Innkeepers opened the Holiday Inn Motel for business under the management of the Tabors. The condemnation action proceeded to the appointment of appraisers by the court. Maley filed exceptions to the appraisers' report, requested a jury trial, and began extensive preparations for trial.

In April of 1971, Andrew Tabor, acting as president of Innkeepers, agreed that Maley would also represent Innkeepers in the condemnation action. This contingent fee

contract between Innkeepers and Maley (Maley's fee contract) contained the same terms and conditions as the Tabor-Maley contract, except that no base amount would be deducted from any recovery since the State had made no prior offer to Innkeepers as an entity separate from the Tabors. Maley's fee contract, however, was not reduced to writing until January 5, 1976, and then by an addendum to the earlier dated Tabor-Maley contract.

On September 13, 1971, the court entered an *ex parte* order granting the State's motion to amend its complaint to join Innkeepers as a party defendant. Maley filed objections to the order on the grounds that it bypassed the statutory requirement that the State give the property owner ten days' written notice of the proposed condemnation along with an offer of compensation. After briefing and a hearing, Maley's objections were overruled.

Maley then obtained a change of venue to the Circuit Court in another county, and the cause was set for jury trial beginning January 5, 1976. However, before trial Maley successfully secured separate trials for the condemnation action against Innkeepers' tract and the action against the tract retained by the Tabors individually.

On January 16, 1976, the condemnation cause against the Tabors individually resulted in a judgment of just compensation and interest since the date of taking in the amount of $31,217.36. Maley was compensated for his services on behalf of the Tabors in accordance with the Tabor-Maley contingent fee contract.

During the pretrial proceedings in the action against Innkeepers, the State expounded its theory that Innkeepers was not damaged by the loss of access to State Road #3 because access could be obtained by easement across the Tabors' land to the public road lying to the south. The legal issues involved included whether Innkeepers was entitled to an easement by necessity because its parcel was landlocked, whether Innkeepers was equitably estopped

from asserting that its tract was landlocked since it knew of the proposed condemnation of access when it obtained the property and built the motel, and whether the State could pierce the corporate veil to show that Innkeepers was the alter ego of the Tabors.

Maley prevailed on these issues by obtaining, through a motion *in limine*, a bar to the State making any reference to the relationship between the Tabors and Innkeepers during the trial. The condemnation action against Innkeepers was set for jury trial on December 6, 1976. Just twenty-six days before trial, however, the cross-appellant here, Alexander Hamilton Life Insurance Company of America (Hamilton), filed a suit against Innkeepers to foreclose the construction financing mortgage on the Holiday Inn tract.

On November 17, 1976, Innkeepers responded by filing a petition in the District Court seeking rearrangement of its financial affairs pursuant to Chapter 11 of the Bankruptcy Act. The Bankruptcy Court permitted Innkeepers to retain possession of its assets and to operate the motel under court supervision. On that same date, the Bankruptcy Court authorized Innkeepers, as debtor in possession, to employ both Maley and a separate law firm on general retainer to provide representation in the bankruptcy proceedings.

On the day of trial, Innkeepers *as debtor* applied for and received authority to proceed with its litigation in the condemnation action.[2]

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[2]The Bankruptcy Court, in its recommendations to the District Court concerning the attorney fees award, erroneously stated that Innkeepers applied for authority to proceed with the litigation as *debtor in possession*. Innkeepers' request, however, was designated "Debtor's Application for Authority to Go Forward with Litigation," and the court's order stated that "the Court being duly advised in the premises now authorizes *the debtor* to proceed with the litigation." (Emphasis added). See page 14 *infra*.

On December 9, 1976, the two-day trial of the condemnation cause resulted in a jury award of $800,000 for the taking of Innkeepers' property and access to the highway. The state court entered a just compensation judgment for that amount, together with the amount of $335,254.79 accrued interest since the day of taking, for a total of $1,135,254.79.

Jim C. Cordes, an attorney at law, aided Maley as local counsel in the trial of the condemnation cause against the Tabors individually and has been compensated for his services in that trial. Cordes again performed local counsel services in the trial of the condemnation cause against Innkeepers at the request of Andrew Tabor, as president of Innkeepers. Maley and Cordes each entered their respective attorney's lien charges on the face of the judgment when it was entered.

On March 28, 1977, pursuant to an agreed entry, the Bankruptcy Court sequestered the proceeds of the just compensation judgment in favor of Innkeepers, ordering the proceeds of that judgment to be paid into the Bankruptcy Court and the priorities of the two mortgages be preserved. The order, however, ignored the perfected attorneys' lien charges.

Then followed some two and one-half years on appeal. The State appealed to the Indiana Court of Appeals resulting in a reversal of the just compensation judgment. Innkeepers appealed to the Indiana Supreme Court resulting on July 29, 1979 in the vacation of the decision of the Court of Appeals and the reinstatement of the state court's judgment of just compensation.

The clerk of the state court issued a check in the amount of $1,193,819.17 as partial payment of the just compensation judgment, payable to Maley, Cordes, and Innkeepers. On November 7, 1979, the Bankruptcy Court ordered that the check be endorsed by Maley and Cordes and delivered to Innkeepers, debtor in possession, to be

deposited in a special account and then reinvested in certificates of deposit. That order specifically provided:

> 6. The asserted attorney liens of Robert J. Maley, Esq. and Jim C. Cordes, Esq., as aforesaid, attach to said proceeds *to the same extent* as if those said funds remained in the possession of the Clerk of the Circuit Court of Fayette County, Indiana.

(Emphasis supplied).

Thereafter Maley and Cordes each applied to the District Court for allowance of their respective attorney's liens.

Maley claimed a fee in an amount equal to fifty percent of the condemnation judgment plus the post-judgment accrued interest to date less the sum of $2,131, the mutually agreed upon amount of the State's offer to the Tabors allocable to the Innkeepers' tract, and arrived at a total claim of $668,734.83. Maley also claimed $5,505.62 for expenses and $8,875 for expert witness fees.

Cordes, who had no explicit fee agreement with Innkeepers, applied for a fee of $100,000 based upon the amount of time spent on the case, the services performed, the customary compensation for local counsel, and the amount of the recovery.

The District Court referred the determination of the fee claims to the Bankruptcy Court which held a full evidentiary hearing after notice to all parties. On July 29, 1980, the Bankruptcy Court returned its formal recommendations (Recommendations) to the District Court, recommending a repudiation of Maley's fee contract and an undivided award of attorney fees to Maley and Cordes of $325,000, less than one-half of the amount called for under Maley's fee contract. The Recommendations characterized the suggested fee award as a bankruptcy administrative expense, and directed that Maley and Cordes reach an agreement as to how to divide it. In addition, the Recommendations approved Maley's claims for expenses and expert witness fees.

Maley and Cordes filed objections to the Recommendations and requested an oral hearing.

On December 11, 1980, the District Court accepted and approved the Recommendations, without granting oral argument or any hearing, and ordered payment of the attorney fees and expenses of litigation allowances as recommended.

Maley filed a timely notice of appeal from that final order. Hamilton timely cross-appealed. Cordes did not appeal, and Innkeepers did not cross-appeal.

ISSUES

1. Whether Maley's fee contract is valid under Indiana law.

2. Whether Maley has a valid statutory lien on the judgment.

3. Whether either the filing of bankruptcy proceedings or the Bankruptcy Court's order authorizing Innkeepers to proceed with the state court litigation invalidated Maley's fee contract and lien.

DISCUSSION
VALIDITY OF MALEY'S FEE CONTRACT

It is conceded by all parties and recognized by the Recommendations that Maley's fee contract with Innkeepers is in writing, dated some eleven months prior to the institution of the Chapter 11 proceedings, and calls for a fee payment in an *amount certain, viz.*, fifty percent of the net recovery. No one disputes that at the time the Chapter 11 proceedings were instituted, Maley's contract was executory in nature in that it was to be performed in the future. *See Re Jolly*, 4 B.C.D. 202, CCH Bankruptcy Law Reporter 66,793. Maley was obligated to provide competent legal services in the defense of the State's condemnation action against Innkeepers through the final disposition of

that case. Upon the completion of such services, the contract called upon Innkeepers to yield and pay the agreed fee.

There is no such thing as a tacit rejection of an executory contract under Chapter 11. Rejection must either be by affirmative action pursuant to §313 or as part of a plan of arrangement under §357(2). *Federal's Inc. v. Edmonton Investment Co.*, 555 F.2d 577 (6th Cir. 1977), teaches:

> "The failure to assume affirmatively an executory contract does not result at any time in the rejection of the contract. Whether the debtor is in possession, or whether there is a receiver or trustee, the contract can be rejected only by the affirmative action under §313(1) and Chapter XI Rule 11-53 or §357(2). Unless so rejected, the contract continues in effect."

8 Collier on Bankruptcy ¶3.15(6) (14th ed. 1976), *quoted in Federal's Inc. v. Edmonton Investment Co.*, 555 F.2d at 579.

As far as the record discloses, no creditor ever sought a rejection of Maley's executory fee contract. Neither Innkeepers as debtor in possession (standing in the legal shoes of a trustee in bankruptcy) nor the Bankruptcy Court, sua sponte, ever specifically rejected the executory fee contract.

Finally, the order of December 6, 1976 authorizing Innkeepers to proceed with the condemnation proceedings as debtor, its original status as a signatory to Maley's fee contract, did not specifically reject the executory fee contract.

It is significant to note at this juncture that neither any creditor nor the debtor in possession nor the Bankruptcy Court, sua sponte, sought the substitution of the debtor in possession for Innkeepers as a party defendant.

No one wished to subject the assets of the estate, then in the hands of Innkeepers as debtor in possession, to further administrative costs or attorney fees which might be

incurred in conducting the litigation. The reason for this state of affairs, as noted in the Recommendations, was that "the changes for a substantial recovery [were] not great." No cash advances nor other bases of further indebtedness on the part of the estate's assets were requested or authorized. We infer that all parties were willing to maintain the status quo of the litigation and that only Maley had sufficient faith that a recovery would be obtained to carry the burden of the litigation to its successful conclusion.

Maley's fee contract was not rejected until December 11, 1980, when the District Court adopted the Recommendations repudiating Maley's contract. However, the purported rejection came too late as Maley had long since fully performed his obligations under the contract with acknowledged legal expertise.[3]

The state court granting the just compensation judgment in favor of Innkeepers originally held the obligation and

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[3]Maley's qualifications and skill in handling the case were described in the Recommendations:

> Applicant Maley was well qualified to handle all of the legal matters that arose during the entire condemnation proceeding. At the present time, he has been engaged in the practice of law some 24 years and, during that time, has specialized in litigation matters. Maley also testified that since he has begun practice, that he had handled more than one hundred eminent domain proceedings. Counsel with these skills was required in the condemnation proceeding because of the intricacy and novelty of the legal questions that arose during the condemnation proceedings at the trial court level and at the Indiana Court of Appeals and the Indiana Supreme Court. These skills were best evidenced by the result obtained by applicant Maley in securing a favorable decision at trial and on appeal.
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> Much time and effort have been devoted by applicant Maley to this cause over a period of some ten years. When Maley was retained by the debtor to pursue the debtor's rights, the probabilities for the success ultimately gained were very slight. The legal questions and maneuvering encountered were successfully overcome and, as a result, not only was new law made in Indiana but the assets of the estate of the debtor were greatly increased.

prereogative of determining the validity of the fee contract and the extent of the corresponding lien under Indiana law. The subsequent appeals stayed the exercise of that obligation. The Bankruptcy Court's order of November 28, 1977, sequestering the proceeds of the condemnation judgment, while proper, ultimately deprived the state court of the opportunity to fulfill that obligation. Thus the Bankruptcy Court assumed the duty to determine the validity of Maley's fee contract under Indiana law.

We agree with the findings in the Recommendations that Innkeepers was "unable and unwilling to compensate Maley on an hourly basis...[and] this contract is a normal type of arrangement for fees in condemnation proceedings, expecially [*sic*] when the changes for a substantial recovery are not great. ... [T]he...fee agreement was a fair one under the circumstances based upon the standards provided by Indiana law."

We hold that the fee contract between Innkeepers and Maley was a valid subsisting executory contract throughout the entire state condemnation action against Innkeepers, and Maley fully performed his part of the contract. The procedures of §313(1) or §357(2) of Chapter 11 were never utilized to affirmatively reject the contract and, as discussed below, the Bankruptcy Court's authorization for Innkeepers to proceed with the litigation as debtor did not constitute a rejection of the contract.

VALIDITY OF MALEY'S LIEN

Attorney's liens in Indiana are governed by I.C. 1971, 33-1-3-1 which provides in relevant part:

> Any attorney practicing his profession in any court of record in this state, shall be entitled to hold a lien, for his fees, on any judgment rendered in favor of any person or persons employing such attorney to obtain the same: Provided, That such attorney, within sixty (60) days from the time such judgment shall have been rendered, enter in writing upon the docket or record

> wherein the judgment is recorded, his intention to hold a lien thereon, together with the amount of his claim....

In *Booram v. Day*, 25 N.E.2d 329, 330 (1940), the Supreme Court of Indiana observed:

> [S]tatutes of this character are generally held to authorize a lien upon something...recovered for...the client...and to be prompted by the same policy that entitles a mechanic to be reimbursed out of that which he creates or improves....

Maley satisfied the requirements of this statute by timely recording on the face of the judgment his intention to hold a lien in the amount called for by his valid contingent fee contract.

EFFECT OF THE BANKRUPTCY PROCEEDINGS ON MALEY'S FEE CONTRACT AND LIEN

The Recommendations concluded that due to the filing of the bankruptcy proceedings and the Bankruptcy Court's subsequent authorization of Innkeepers to proceed with the condemnation litigation, the provisions of Bankruptcy Rules 219[4] and 220[5] displaced Maley's fee contract and lien

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[4]Bankruptcy Rule 219 provides in part:

(c) *Factors in Allowing Compensation.*

(1) *General.* The compensation allowable by the court to a trustee, receiver, marshal, attorney, accountant, or other person entitled to compensation for services rendered in the administration of a bankrupt estate shall be reasonable, and in making allowances the court shall give due consideration to the nature, extent, and value of the services rendered as well as to the conservation of the estate and the interests of creditors.

[5]Bankruptcy Rule 220 provides in relevant part:

(b) *Payment or Transfer to Attorney, or Agreement Therefor, After Bankruptcy.* On motion by the bankrupt or on the court's own initiative, the court may examine any payment of money or any transfer of property, or any agreement therefor, by the bankrupt to an attorney after bankruptcy, whether the payment or transfer is

(Footnote continued on following page)

as the basis for determining the amount of attorney fee award. We disagree.

Innkeepers, upon its appointment as debtor in possession, held the duty to garner unto the summary jurisdiction of the Bankruptcy Court *all* of the assets of the debtor Innkeepers and to report them to that court. Among the assets of Innkeepers, the debtor, was a chose in action of constitutional origin to receive just compensation for its properties being taken by the State for a public use in the condemnation action. This chose in action was, however, encumbered with Maley's fee contract and the evolving Indiana statutory attorney's lien charges. Innkeepers fulfilled its duty by describing the chose in action and Maley's fee contract in its statement of affairs filed pursuant to §324(1) of the Act, 11 U.S.C. §724(1).

In an analogus situation, the court in *Sherman v. Buckley*, 119 F.2d 280 (2d Cir. 1941), noted that the Trustee (or, as here, the debtor in possession) was at liberty to exercise one of three options:

(1) It could have discontinued the litigation and disposed of the debtor's chose in action as best it could. Yet here, Attorney Maley's valid executory fee contract would have to have been affirmatively rejected and liquidated.

(2) It could have intervened in the state condemnation action or substituted itself in lieu of the corporate

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made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the bankruptcy.

(c) *Invalidation of Unreasonable Payment, Transfer, or Obligation.* Any payment, transfer, or obligation examined under subdivision (a) or (b) of this rule shall be held valid only to the extent of a reasonable amount as determined by the court. The amount of any excess found to have been paid or transferred under subdivision (a) or (b) may be recovered for the benefit of the estate or the bankrupt, as their interests may appear, and any obligation found to be excessive may be cancelled to the extent of the excess.

Innkeepers as a necessary party defendant and taken on the furtherance of the litigation. In that event, the debtor in possession could have retained Maley as the attorney under his fee contract or under some other mutually agreeable terms of employment, or discharged Maley and employed another attorney. However, had Maley been discharged as the attorney, his valid fee contract would have to have been liquidated.

(3) It could have left the litigation in its status quo by leaving Innkeepers as debtor and Attorney Maley to fight out the litigation at their own expense, and then stepped in to claim the fruit of the recovery encumbered with Maley's attorney fee lien charge.

The third option is exactly what the debtor in possession and the Bankruptcy Court elected to do, as evidenced by the December 6, 1976 order authorizing Innkeepers *as debtor* to carry on. That order subjected the whole of the litigation, including the settlement and liquidation of the attorney's lien charge based on Maley's fee contract, *to the jurisdiction of the state court.*

> In spite of the fact that the jurisdiction of the bankruptcy court is usually described as "exclusive," it may consent to have the interests of third persons in property of which the bankrupt had possession, adjudicated in a state court if that is more convenient. [Citations]. As we have said, the [debtor in possession] got the permission of the bankruptcy court to allow the action to be prosecuted in the state court. That necessarily involved a consent to such incidents as the exercise of that court's jurisdiction might involve....

Sherman v. Buckley, 119 F.2d at 282.

We proceed upon the simple premise that throughout the state court condemnation action against Innkeepers, Maley was performing legal services for his client Innkeepers in its pre-Chapter 11 status and thereafter in its status as the debtor, subject to the jurisdiction of the state court, with the

express approval and consent of the Chapter 11 Bankruptcy Court. Maley never performed any legal services for Innkeepers *as debtor in possession* under the direction of the Bankruptcy Court, and his fee claims do not relate to any such services.

At the time of the December 6, 1976 order granting Innkeepers *as debtor* authority to continue the litigation in the State's condemnation action, the Bankruptcy Court well knew from Innkeepers' Statement of Affairs then before it that Maley held the fee contract with Innkeepers for his legal services calling for a fee of fifty percent of the net recovery.

We specially note that at the commencement of the Chapter 11 proceedings, some twenty-six days before the trial date of the condemnation action, Maley had for all practical purposes completed his legal services by obtaining a favorable pretrial stance and developing a trial strategy and proposed trial expert evidence of damages for the loss of access. All that was left to be done was to put that legal work product to play during a short two day trial. The appeals were forced upon Maley and he served with remarkable expertise for no additional fee.

Throughout the Recommendations, the legal services of Maley and Cordes were considered as services for Innkeepers as *debtor in possession* rather than for Innkeepers in its pre-Chapter 11 status and thereafter in the status *as debtor*. The Recommendations then proceeded to repudiate Maley's valid fee contract provisions, and in lieu thereof, utilized bankruptcy law in fixing Maley's and Cordes' fees in a lower undivided amount of $325,000. The award was expressly based upon a consideration of the factors enumerated in *Jacobowitz v. Double Seven Corp.*, 378 F.2d 405, 408 (9th Cir. 1967).

In *Jacobowitz*, the trustee's attorney, under appointment by the Bankruptcy Court, expended many hours during plenary proceedings in bankruptcy in performing legal

services for the estate. The attorney held no fee contract calling for an amount certain. He filed a claim in quantum meruit claiming that the measure of compensation should be the amount he would have received for the same services in private practice. *Jacobowitz* rejected the contention that such a measure of compensation is conclusive and instead adopted a bankruptcy law test of balancing the factors involved in any given case. Those factors include the size of the estate and the proportionate amount thereof recovered through the efforts of the attorney, the time expended by the attorney, the difficulty of the legal issues involved, the attorney's skill, the opposition met, and the expert evidence concerning the reasonableness of the requested fee. All of these factors are to be considered in light of the "economical spirit of the Bankruptcy Act." *Id.*

The utilization of these factors here, however, was reversible error because Maley's services were not rendered as part of the bankruptcy proceedings, but were instead performed on behalf of the debtor pursuant to a valid fee contract which antedated the filing of the bankruptcy petition and which was never rejected.[6]

This court's decision in *In re Land Investors*, 544 F.2d 925 (7th Cir. 1976), does not compel a different conclusion. That case upheld a Bankruptcy Court's utilization of a "reasonable fee" basis in determining the extent of attorney's liens against the proceeds of a state court lawsuit which had been commenced before the plaintiff filed for bankruptcy. The attorneys there had entered into a contingent fee contract with the plaintiff which, unlike Maley's contract, specified no particular fee or percentage

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[6]Even if the *Jacobowitz* test were applicable here, we note that the factor of considering the economical spirit of the Bankruptcy Act (keeping administrative expenses at a minimum), so heavily expounded in the Recommendations, was held in that case not to "require, nor justify, reducing a requested fee where, as here, by all other proper standards it is a fair and reasonable one...." *Jacobowitz v. Double Seven Corp.*, 378 F.2d 405, 408 (9th Cir. 1967).

of the recovery which was to be awarded to the attorneys. Instead, the contract provided merely that the fee would be based on the amount and difficulty of the services provided and the degree of success achieved. After a favorable judgment was obtained in the state court action, the Bankruptcy Court ordered the proceeds turned over to the court.

This court upheld both the exercise of summary jurisdiction over the proceeds and the use of the "reasonable fee" standard in determining the extent of the liens. While the intervention of bankruptcy proceedings was held not to vitiate the lien, the Bankruptcy Court was found to have had "no real alternative to determining a reasonable contingent fee" due to the failure of the fee contract to specify a particular amount or percentage. *Id.* at 932.

In this case, however, Maley's fee contract specifically stated that this fee was to be fifty percent of any net recovery. It was, therefore, error to use a "reasonable fee" standard in lieu of the valid fee contract as the basis for determining the extent of Maley's lien.

The District Court's specific reliance upon *Massachusetts Life Ins. Co. v. Brock*, 405 F.2d 429 (5th Cir. 1968), *cert. denied*, 395 U.S. 906 (1969), in approving the Recommendations is similarly misplaced. That case involved an appeal by a creditor in a Chapter 10 proceeding from the District Court's allowance of interim fees for the trustee and his attorney who held no contract for fees. The application of bankruptcy law in determining reasonable fees for the services of the trustee and his attorney was entirely correct in that cause because their services, unlike Maley's, were rendered only after the Chapter 10 proceedings had begun, only in connection with those proceedings, and only under the jurisdiction of the Bankruptcy Court.

The Bankruptcy Court here, by contract, through its December 6, 1976 order, first relinquished its "exclusive

summary jurisdiction" over Innkeepers' just compensation litigation to the state court. That necessarily included all legal incidents flowing from that state jurisdiction, including the settlement and liquidation of any perfected Indiana attorney's lien from the proceeds of a judgment entered by that court. *See Sherman v. Buckley*, 119 F.2d at 282.

The subsequent March 28, 1977 order sequestering the proceeds of that judgment was the first exercise of the Bankruptcy Court's exclusive summary jurisdiction of the proceeds of the chose in action. However, that exercise did not defeat the priority of Maley's perfected attorney fee lien.

Bankruptcy courts are subject to some limitations in the exercise of their summary jurisdiction in circumstances such as those presented here. Thus, "[w]here an attorney [is retained to seek a recovery in pending litigation] on behalf of a [client who becomes a bankrupt midstream], the filing of a petition in bankruptcy does not terminate his employment nor stay the pending [litigation]." *In re Prudence Co.*, 96 F.2d 157, 159 (2d Cir. 1938). Where the trustee or debtor in possession elects not to take over the litigation, thereby avoiding subjecting the estate to any risk of loss, the pre-bankruptcy attorney fee contract remains in effect. *Id.*

Thus, when the Bankruptcy Court sequestered the proceeds of the recovery on Innkeepers' chose in action, those proceeds were encumbered with the perfected attorney's lien charges for Maley's services pursuant to his fully executed fee contract. "Bankruptcy does not invalidate such liens." *In re Prudence Co.*, 96 F.2d at 160.

The Bankruptcy Court's order of November 7, 1979, taking over the proceeds of the Clerk's check for partial payment of the judgment, was the second attempt to exercise summary jurisdiction and foreclose the state court from acting in settlement and liquidation of Maley's

perfected attorney's lien. The Bankruptcy Court, by so doing, stepped into the shoes of the state court for that purpose,[7] and acknowledged that fact in the above quoted paragraph 6 of the order.

POST-JUDGMENT INTEREST

The Recommendations contained the erroneous conclusion that no part of the post-judgment interest accruing on the just compensation award should be awarded to Maley. Maley's fee contract provided for a fee of fifty percent of the net recovery and stated that the fee was to become due and payable when the amount of the judgment became payable to Innkeepers. The judgment became payable to Innkeepers when the just compensation judgment was entered. Therefore, interest accruing during the ensuing appeals is to be shared between the debtor in possession and Maley in proportion to their respective interests in the judgment.

The Recommendations also contain a clearly erroneous finding that Maley has been paid $2,500 of his fees. The undisputed evidence is that the notation in Innkeepers' Statement of Affairs indicating such a payment was a mistake.

The Recommendations correctly awarded Maley his personally paid expenses in the amount of $5,505.62 and the unpaid expert witness fees in the amount of $8,875.

DISPOSITION

That part of the District Court's final order fixing Maley's fee in the amount of $325,000, to be shared with Attorney Cordes as they shall agree, is reversed.

That part of the District Court's final order granting Maley the recovery of his personally paid expenses in the

[7] See *United States v. Transocean Air Lines, Inc.*, 356 F.2d 702 (5th Cir. 1966).

amount of $5,505.62, as well as the amount of $8,875 for unpaid expert witness fees, is affirmed.

The cause is remanded to the District Court to hold an evidentiary hearing, after notice, for the purpose of determining:

(1) The total sum of the gross recovery for Innkeepers in the condemnation action under the final just compensation judgment plus all amounts of cost and expenses of litigation allowed by the Indiana courts following the appeals.

(2) The proper segregated amount of the State's ten-day letter final offer to be applied to Innkeepers' tract. From the sum of such gross recovery, the District Court shall:
   (a) Distribute to the bankrupt's estate the amount of such segregated amount of the State's final offer;
   (b) Distribute to Maley the sum of his allowed personally paid expenses and unpaid expert witness fees; and
   (c) Designate the balance of the gross recovery as the net recovery for Innkeepers.

(3) The proper amount in settlement and discharge of Maley's perfected attorney's lien pursuant to the terms of his valid fee contract under Indiana law, and shall distribute that amount to Maley from the net recovery.

(4) The proper amount in settlement and discharge of Cordes' perfected attorney's lien on the basis of quantum meruit under Indiana law, and shall distribute that amount to Cordes from the net recovery.

(5) The balance of the net recovery for distribution to the bankrupt's estate.

(6) The total sum of the amounts of all post-judgment interest paid by the State and all of the interest

> received by the Bankruptcy Court from the investments of the proceeds of the final just compensation judgment, and shall distribute that total sum of interest, first, to Maley; second, to Cordes; and, third, to the bankrupt's estate, in the proportion that their respective award relates to the total recovery from the State for Innkeepers in percentages.

All not inconsistent with the foregoing opinion.

The District Court may, if deemed appropriate, refer the hearing and determinations to a Bankruptcy Judge for recommendations.

Maley is to recover allowable costs and expenses of appeal.

CROSS-APPEAL

The subject of Hamilton's cross-appeal is now moot. The cross-appeal is dismissed with allowable costs and expenses on appeal to Maley.

REVERSED IN PART, AFFIRMED IN PART,
AND REMANDED FOR FURTHER PROCEEDINGS.
CROSS—APPEAL DISMISSED.

FAIRCHILD, *Senior Circuit Judge*, concurring. In my opinion, a court has some degree of supervisory power over attorney's fees charged for services in a case before the court. The power is derived from the relationship between the court and its officers, and it would include a decision that a literal application of a contingent fee contract would produce a fee so excessive that it could not be countenanced by the court as a matter of public policy. *See, e.g., Snow v. Mikenas*, 373 Mass. 809, 370 N.E.2d 1001, 1003 (1977) ("[A] judge is authorized to raise the question of the reasonableness of a contingent fee arrangement on his own motion where . . . the attorney intends to collect his fee from funds to be distributed through him by court order"); *Tonn*

v. Reuter, 6 Wis.2d 498, 504, 95 N.W.2d 261 (1959) ("A contingent-fee contract is always subject to the supervision of the courts as to its reasonableness"); *Harmon v. Pugh*, 38 N.C. App. 438, 248 S.E.2d 421, 425 (1978) ("[A contingent fee] contract, even though found to have been entered into fairly and in good faith and without suppression of fact, is subject...to the scrutiny of the court as to its reasonableness"); *see generally* 7 Am. Jur.2d *Attorneys at Law* §255 (1980); Annot. 77 A.L.R.2d 411.

I do not view the question of supervisory power as necessarily presented by this case. That approach would require a decision whether in these circumstances the state court or the bankruptcy court should exercise the power. The federal court decision that the amount it allowed is reasonable does not amount to a decision that the fee claimed per contract would be excessive, giving appropriate consideration to the factors incidental to contingent fee arrangements. And counsel have not argued that approach. Because I do not read this case as necessarily presenting the question of supervisory power, I concur in the opinion authorized by Judge East, and dealing with the issues which the appeal does present.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES ~~BANKRUPTCY~~ DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN THE MATTER OF	)
	) IN PROCEEDINGS
INNKEEPERS OF NEW	) FOR AN ARRANGE-
CASTLE, INC.,	) MENT
	)
DEBTOR.	) No. IP 76-22-RA

ORDER OF COURT FOR PAYMENT OF ATTORNEYS' FEES AND ALLOWANCES

This matter is now before the Court upon the recommendations of the Bankruptcy Judge for the payment of attorneys' fees, witness fees, allowances and expenses in the Chapter XI Proceedings for an Arrangement of Innkeepers of New Castle, Inc., and the Court having now considered said recommendations along with the objections of Robert J. Maley, attorney, and the response of Alexander Hamilton Insurance Company of America, Inc., now adopts the recommendations of the Bankruptcy Judge Nicholas W. Sufana in regard to payment of said fees and expenses.

In approving the fees recommended by Bankruptcy Judge Nicholas W. Sufana, the Court has attempted to follow the principles set out in the following citation from *Mass. Life Insurance Co. v. Brock*, 405 F.2d 429 (C.A. 5, 1968):

> "The public interest which is inherent in bankruptcy matters must be considered in awarding fees. The object is to draw a balance to the end that competent trustees and counsel are obtainable... [and] ... fairly compensated... while at the same time doing equity to the debtor and creditors." 405 F.2d at 432-433.

It is further the opinion of the Court that said Bankruptcy Judge fully considered and then recommended a

proper allowance in this organization proceeding; and that said recommendations are fully supported based on the facts and the law as presented in said recommendation dated July 24, 1980, as more fully set forth

(H.I.)

NOW THEREFORE, the Court ORDERS payment of the following fees and expenses in connection with services rendered as reasonable and just compensation:

	Allowances	Expenses
ROBERT J. MALEY, Attorney for Debtor and Debtor in Possession (including his co-counsel Jim C. Cordes) as a final allowance	$325,000	$5,505.62
R. H. HUNNINGS Expert Witness		$8,875.00

DATED this 11th day of December, 1980.

/s/ James E. Noland
JAMES E. NOLAND, U.S. District Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN THE MATTER OF	)	
	)	IN PROCEEDINGS
INNKEEPERS OF NEW	)	FOR AN ARRANGE-
CASTLE, INC.,	)	MENT
	)	
DEBTOR.	)	No. IP 76-22-RA

TO THE HONORABLE JAMES E. NOLAND, JUDGE OF THE DISTRICT COURT

RE: **RECOMMENDATIONS OF BANKRUPTCY JUDGE ON APPLICATIONS FOR ALLOWANCES**

Your Bankruptcy Judge, to whom this cause was referred, respectfully reports that the following Applications for Allowances were filed in this cause:

	ALLOW. REQ.	EXPS. REQ.
ROBERT J. MALEY Attorney for Debtor and Debtor-in- Possession (Final Allowances)	$668,734.83	$5,505.62
JIM C. CORDES Attorney for Debtor (Final Allowances)	$100,000.00	None
R. H. HUNNINGS (Expert witness fee)		$8,875.00

	ALLOW. RECOM.	EXPS. RECOM.
ROBERT J. MALEY Attorney for Debtor and Debtor-in Possession (Final Allowances)	$325,000.00	$5,505.62
JIM C. CORDES Attorney for Debtor (Final Allowances)		None
R. H. HUNNINGS (Expert witness fee)		$8,875.00

The foregoing applicants have not complied with Section 62(d) of the Bankruptcy Act and Bankruptcy Rule 219(b) concerning the disclosure of compensation paid or promised and concerning the division of compensation by the filing of affidavits disclosing same.

On December 4, 1979 your Bankruptcy Judge ordered a hearing set for December 14, 1979 at 9:30 A.M. to consider and act upon the requested allowances, a copy of which notice is attached herewith and marked "Exhibit A."

Appearing at said hearing were SIGMUND BECK and MARK CENTER for Bamberger and Feibleman, attorney for the debtor and debtor-in-possession and ROBERT J. MALEY, co-counsel for the debtor-in-possession. Also appearing were R.M. Kroger for JIM C. CORDES and JIM C. CORDES in person.

Formal objections to applications for allowances and expenses were filed on December 13, 1979 by Alexander Hamilton Life Insurance Company of America and by Citizens State Bank of New Castle, Inc., secured creditors of the debtor-in-possession. Stephen K. Smith and David M. Powlen appeared for Alexander Hamilton Insurance Co. and Citizens State Bank of New Castle, Inc. appeared by Steven H. Ancel and Sally J. O'Connor of the Ancel law firm. Andrew and Lucille Tabor, stockholders of the debtor-in-possession, appeared by Dennis D. Cole of Anderson, Indiana.

Appearing at the hearing as witnesses for Jim C. Cordes were Frank W. Messer, Jr. and Thomas L. Tarvin of Connersville, Indiana. Appearing as witnesses for Robert J. Maley were Howard Young and Donald Ward, attorneys of Indianapolis, Indiana.

Hearing of the matter was incomplete and was continued to January 14, 1980 when same parties appeared. Also at said continued hearing as a witness for Citizens State Bank of New Castle was David Kleiman, attorney of Indianapolis, Indiana.

GENERAL STATEMENT

This cause was commenced on November 17, 1976 with the filing of a petition for an arrangement under Chapter XI of the Bankruptcy Act.

Innkeepers of New Castle, Inc. was incorporated under the laws of Indiana on February 24, 1967. The principal stockholders of the corporation are Andrew Tabor and Lucille Tabor, who own approximately 78% of the outstanding common stock of the corporation. Andrew Tabor is the President and Treasurer of the corporation. Lucille Tabor is the Vice-President, and Barbara Marting is its Secretary.

A proper evaluation of allowances in this cause requires a brief recount of the events leading up to the condemnation action and the filing of the Chapter XI proceeding.

Prior to February 24, 1967, all of the land which now belongs to Innkeepers of New Castle was owned by Andrew and Lucille Tabor jointly. On July 8, 1966 Andrew Tabor, in the name of Holiday Inn, applied to the Indiana State Highway Commission for a permit to construct a driveway entrance onto State Road 3, Henry County, Indiana, from land the Tabors then owned and which was to provide an entrance for the then proposed Holiday Inn. Tabor received a letter dated November 29, 1966 from the State's Permit Engineer which purported to deny the access application because of a proposed widening of State Road 3 at that location and because State Road 3 was proposed to be a limited access highway. At that time, plans had apparently not been finalized for any modification of State Road 3 by the State of Indiana.

Andrew and Lucille Tabor deeded to Innkeepers of New Castle, Inc. a 4.82 acre tract of land on May 31, 1969, which deed was recorded on June 2, 1969, out of a 33.96 acre trace owned by the Tabors. This 4.82 acre tract is the present location of the Holiday Inn and has a frontage facing State

Road 3 of approximately 350 feet. The Tabors' retained portion of the 33.96 acres includes a frontage to state Road 3 on each side of that deeded portion.

Financing for the construction of the Holiday Inn was obtained and construction was begun. The Inn was then substantially completed by October 23, 1969 and opened for business in August of 1970 under management of the Tabors.

Also relevant to allowances in this cause is the history of the condemnation litigation which resulted in a judgment of $1,135,254.79 in favor of Innkeepers of New Castle, Inc.

On April 7, 1969 the State of Indiana caused to be sent to Andrew and Lucille Tabor (the Tabors) a letter which offered the sum of $7,731.00 for a strip of land that fronted State Road 3 and which was to be condemned. This figure represented an amount for total compensation of the Tabor land which included that parcel of land the Tabors had previously deeded to Innkeeprs of New Castle, Inc. although no letter was sent to Innkeepers of New Castle, Inc. as owner or otherwise of that parcel of land.

Robert J. Maley was retained by the Tabors to represent them in the ensuing proceedings at a rate of 50% of any net gain received above the State's original offer. This contract was reduced to writing and executed by the Tabors and Maley on May 5, 1971. On or about April 30, 1971 Andrew Tabor, acting as President of Innkeepers of New Castle, Inc. and Robert J. Maley agreed that applicant Maley would also represent Innkeepers of New Castle, Inc. in the condemnation proceeding and this agreement was later reduced to writing by addendum to the Tabor-Maley contract and dated January 5, 1976, a period of almost five years. The contract between Maley and Innkeepers of New Castle contained the same terms and conditions as the Tabor-Maley contract except that no base amount would be deducted from any recovery since the State of Indiana had made no prior offer to Innkeepers of New Castle as an entity separate from the Tabors.

On December 19, 1969 the State of Indiana filed suit in Henry County Circuit Court to condemn a narrow strip of land along State Road 3 which included the frontage of the 33.96 acre tract owned by the Tabors and including that portion of the frontage which had been deeded to Innkeepers of New Castle, Inc. This suit also eliminated all right of direct access from these lands onto State Road 3. Named as defendants in this action were Andrew and Lucille Tabor and Citizens State Bank of New Castle, but not Innkeepers of New Castle, Inc.

On September 13, 1971 an *ex parte* order was entered in the Henry Circuit Court which granted the State's motion to amend its complaint and which joined Innkeepers of New Castle, Inc. as a party defendant to the condemnation proceeding. After objections to the procedures by which Innkeepers was made a party were overruled, the cause was venued to the Circuit Court of Fayette County.

Based upon a theory that the debtor's land was taken without proper exercise of the power of eminent domain and without just compensation, an inverse condemnation action was filed in Henry County Circuit Court, entitled Innkeepers of New Castle, Inc. v. State of Indiana, on July 24, 1972. This action was then venued to Hancock Superior Court where it is still pending.

On or about January 31, 1975 applicant, Jim C. Cordes, entered his first appearance in the condemnation proceeding pending in Fayette County Circuit Court. Applicant Cordes was retained to act as local counsel by Maley in the cause since his law practice was located in Fayette County. Trial of the cause was set for January 5, 1976, however, prior to that time, applicants Maley and Cordes were successful in separating trial of the cause of the Tabors from that of Innkeepers of New Castle, Inc. The reason for this, and also the reason for a motion in limine filed in the Innkeepers trial, was to prevent the State of Indiana from making any references to the relationship

between the Tabors and Innkeepers of New Castle. The State's case was based upon a theory that Innkeepers of New Castle was not damaged to the extent claimed by the elimination of direct access to State Road 3 because access could be gained by an easement across Tabor land to County Road 300 South which intersects with State Road 3 some 220 feet south of the parcel of land deeded to Innkeepers of New Castle.

Trial of the Innkeepers of New Castle cause was then set for December 6, 1976. In the meantime, on November 17, 1976 the debtor's petition under Chapter XI of the Bankruptcy Act was filed. Also on that date the debtor was authorized by your Bankruptcy Judge to employ the law firm of Bamberger and Feibleman and Robert J. Maley as attorneys for the debtor-in-possession under a general retainer in the Chapter XI proceedings. On December 6, 1976 an order was entered which authorized the debtor-in-possession to go forward with litigation designated as State of Indiana v. Innkeepers of New Castle, Inc. Trial of the cause was concluded and on December 8, 1976 the Circuit Court of Fayette County entered judgment in favor of Innkeepers of New Castle, Inc. in the amount of $335,254.79 in interest plus the amount of the verdict as determined by the jury in the amount of $800,000.00, or a total judgment of $1,135.254.79.

The State of Indiana subsequently filed its motion to correct errors which was denied. On October 5, 1977 the State filed its Verified Petition for Extension of Time to File Record of Proceedings for its appeal to the Indiana Court of Appeals and alleged that the Court Report had not been able to complete the transcript of the trial court proceedings. On October 13, 1977 applicant Maley filed, on behalf of Innkeepers of New Castle, Inc., a Motion to Deny Appellant's Petition for Extension of Time to File Record of the Proceedings and to Dismiss Appeal together with an affidavit secured by applicant Cordes from the trial court

reporter that the transcript of evidence had in fact been completed on September 7, 1977. The Court of Appeals granted the State's request on October 12, 1977 and extended time to November 10, 1977. On November 4, 1977 the State filed its second Verified Petition for Extension of Time to File Record of the Proceedings alleging that the transcript was still not available. On November 8, 1977 applicant Maley filed a second motion to deny the State's petition, however, the Court of Appeals again granted the State's request.

On May 16, 1978 the Court of Appeals for the First District of Indiana rendered its opinion and reversed the trial court on the basis that it was error to exclude evidence regarding the relationship between Innkeepers of New Castle, Inc. and the Tabors. A petition for rehearing was filed on June 5, 1978 and was subsequently denied. A request for transfer to the Supreme Court of Indiana was then made and on July 25, 1979 the Indiana Supreme Court rendered its opinion which vacated the decision of the Court of Appeals and reinstated the judgment entered by the Circuit Court of Fayette County.

Innkeepers of New Castle, Inc., as previously noted, began operating its motel and restaurant in August of 1970. At that time, Innkeepers major creditor was Indiana National Bank who held a note with a face value of $600,000.00 the proceeds of which were used for construction of the motel. This note was secured by a mortgage on the Innkeeper's land and building which was dated September 18, 1969 and recorded on September 25, 1970. On March 25, 1971 a note with a face value of $135,000.00 and a second mortgage on the premises were executed in favor of the Citizens State Bank of New Castle for an additional loan to the debtor.

On or about November 10, 1976 Alexander Hamilton Life Insurance Company of America, the assignee of the Indiana National note and mortgage, caused to be filed in

the Circuit Court of Henry County an action for the collection of the debt, which at that time was alleged to be in the sum of $513,704.96 in principal together with interest at the rate of 9% per annum from May 1, 1976 through May 31, 1976 and at the rate of 10% per annum from June 1, 1976 from then on, and for foreclosure of its mortgage and security interest. This action was followed on November 17, 1976 by the debtor's Chapter XI petition for an arrangement.

On January 14, 1977 a First Meeting of Creditors and a hearing regarding application for approval of a management agreement between Innkeepers of New Castle, Inc. and Brooke Inns, Inc. whereby Brooke Inns, Inc. would manage the Holiday Inn operations for the debtor-in-possession was held. This management agreement was approved by the Court on February 7, 1977.

On March 28, 1977 an Agreed Entry on Application for Appointment of Receiver, For Sequestration of Condemnation Judgment Proceeds and Rents, Issues, Income and Profits and to Require Debtor to Indemnify or Otherwise Protect Estate Against Loss was approved by the Court. Pursuant to this agreed entry, it was ordered that any proceeds from the condemnation judgment be sequestered and paid into the Court until further order of the Court and that the respective mortgages of Alexander Hamilton Life Insurance Company of America and Citizens State Bank of New Castle constitute valid and enforceable liens upon the Condemnation Judgment proceeds to the same extent and amount and with the same relative priority as such mortgages constitute valid and enforceable liens on the real estate of the debtor as described in such mortgages.

On November 15, 1979 the debtor-in-possession was granted authority to invest the proceeds of the condemnation award in the amount of $1,135,254.79 and subject to the order of sequestration which had previously been made on March 28, 1977. Attorney liens were asserted

against the proceeds of the judgment by applicants Robert J. Maley and Jim C. Cordes which had been entered on December 8, 1976 on the judgment in the amounts of $567,637.00 and $100,000.00 respectively.

On November 15, 1979 attorneys for the debtor-in-possession were ordered to file their applications for interim allowances by November 30, 1979 and hearing was set for same on December 14, 1979.

GENERAL STATEMENT OF ALLOWANCES IN REORGANIZATION PROCEEDINGS

The basis for awarding fees in a Chpater XI proceeding are generally the same as those applicable in a straight bankruptcy proceeding including the economy principle characterized in numerous decisions on the question of allowances in said cases. In this case there has been no receiver or trustee named or appointed as the debtor-in-possession has conducted the business to the present time.

The attorney for the debtor is the key person in a Chapter XI proceeding. He usually prepares and files the schedules and statement of affairs, petitions for the arrangement and all other applications and orders. He also represents the debtor at all hearings and meetings of creditors. The attorney for the debtor is responsible for objecting to claims and drafting a plan of arrangement, although in this case, a plan of arrangement has not yet been filed.

There are many standards on which a reasonable attorney fee is based. Among these standards are the time, labor and skill required, the difficulty of the questions encountered, time limits and an ability of the estate to pay. In a Chapter XI proceeding, however, the most important test is the formulation of an acceptable plan of arrangement and achieving its confirmation.

The attorney for the debtor-in-possession is appointed only on order of the court on the petition of the debtor-in-

possession. The attorney must advise and counsel the debtor on every phase of the operation such as borrowing monies, executing leases, and instituting proceedings before the court or in any other court to challenge the validity of liens on the debtor's property, and for the recovery of property. The duties for the attorney for the debtor-in-possession are often those which an attorney for a trustee in straight bankruptcy would have to perform. The law firm of Bamberger and Feibleman had advised the debtor-in-possession as to its responsibilities under the Chapter XI proceeding and have prepared all of the required applciations and orders regarding operation of the business.

APPLICATION OF ROBERT J. MALEY FOR PAYMENT OF ATTORNEY FEES

Robert J. Maley was, by order of the Court dated November 17, 1976, appointed co-counsel for the debtor-in-possession under a general retainer. Applicant Maley had also represented the debtor prior to his appointment as co-counsel for the debtor-in-possession and his application is presented in the form of a moetion for the Court to order the debtor-in-possession to pay attorney fees for services performed and based upon a contingent fee arrangement entered into between applicant Maley and Innkeepers of New Castle, Inc. on or about April 30, 1971. The first question which must be answered is whether the Court has jurisdiction to determine compensation for applicant Maley.

Allowances under the Bankruptcy Act are guided by several underlying principles, the first of these being "economy first." The Bankruptcy Act was designed for relief of debtors rather than an act for the relief of attorneys and court officers. *In re Builders & Mfger's Supply Co.*, 235 F.Supp. 453 (W.D. Pa., 1964). The second principle is that there should be no compensation to an attorney without some correlative benefit to the entirety of creditors,

Dickinson Industrial Site, Inc. v. Cowan, 309 U.S. 382, 60 S.Ct. 595, 84 L.Ed. 549 (1940), and while efficiency should be rewarded, the reward must not exceed the value of the additional benefit. *Matter of United Funds Mfg. Corp.*, 53 F.Supp. 467 (W.D. Mo., 1943). The last of these principles is that no creditor or party in interest has the power to bind the court in exercise of its discretion in making allowances. 3A COLLIER ON BANKRUPTCY (14th Ed.) ¶62.05[3].

The bankruptcy court has wide discretion in the allowance or disallowance of attorney fees in bankruptcy cases under Bankruptcy Rules 219 and 220, and these rules are applicable in Chapter XI proceedings through Bankruptcy Rules 11-31 and 11-32. The responsibility for determination of compensation is one peculiarly for the bankruptcy court, *Matter of Aaron Ferer & Sons Co.*, 427 F.Supp. 350 (D.C. Neb., 1977), and normally, the bankruptcy court may examine any fee, if it is in any way related to the bankruptcy proceeding, to make a determination of reasonableness. 12 COLLIER ON BANKRUPTCY (14th Ed.) ¶220.04. Therefore, it may be safely concluded that in a normal bankruptcy proceeding, the bankruptcy court has exclusive jurisdiction to determine allowances whether the case is one of liquidation or a proceeding for an arrangement.

The situation of applicant Maley is not the normal one to confronted by the Court. Applicant Maley was first employed by the debtor some seven years prior to the initiation of these proceedings. On or about April 30, 1971 a fee agreement was entered into by the debtor and applicant Maley and said agreement was reduced to writing on or about January 5, 1976. These facts lend some credence to the argument that the fee agreement or the amount of fee generated do not run afoul of Bankruptcy Rules 219 and 220 when one of the main purposes of these rules is to protect creditors of the estate by providing a restraint on a bankrupt's opportunities to make unreasonable dispositions of his property through an arrangement for excessive

payments for legal services. See: *Conrad, Rubin & Lesser v. Pender*, 289 U.S. 472, 53 S.Ct. 703, 77 L.Ed. 1327 (1933).

Contingent fee agreements are not favored in bankruptcy cases and have been held to be improper. *Watkins v. Sedberry*, 261 U.S. 571, 43 S.Ct. 411, 67 L.Ed. 802 (1923). It has also been noted that contingent fee agreements may be in violation of the penal code, specifically 18 U.S.C. §155. *In re Astro-Matic Lubricare, Inc.*, 3 Bankr.Ct.Dec. 233 (M.D. Tenn. [Bankr.], 1975). Allowances based upon contingent fee agreements have been allowed, however, and those decisions have also held that the relevant inquiry is not whether the agreement is reasonable but whether the amount of compensation generated by the agreement was reasonable. *In re Don Carter*, 433 F.Supp. 291, 3 Bankr.Ct.Dec. 503 (W.D. Mo., 1977).

As a general rule, services performed prior to a petition in bankruptcy are not compensable from the bankruptcy estate except to the extent the services are beneficial to these estate. *Randolph v. Scruggs*, 190 U.S. 533, 23 S.Ct. 710, 47 L.Ed. 1165 (1903). Compensation to attorneys has been denied even where the litigation was begun prior to commencement of bankruptcy proceedings, *In re Taylor*, 28 Fed. 127 (D.C. Wyoming, 1922), and, even when such services were of ultimate benefit to the estate. *Matter of Luber*, 261 Fed 221 (E.D. Pa., 1919). However such a fee may be paid as an expense of administration in situations where counsel is "...conducting ongoing complex litigation for the benefit of the estate as compared with the general services normally rendered by bankruptcy attorneys to debtors." *Matter of Pacific Far East Line, Inc.*, 458 F.Supp. 771, at 774 (N.D. Ca., 1978).

The facts in *Matter of Pacific Far East Line, Inc.*, supra, are not unlike those here. Counsel had been hired to pursue a breach of warranty action more than three years prior to the initiation of Chapter XI proceedings by the debtor and

pursuant to a contingent fee agreement. After the Chapter XI proceedings began, counsel was appointed by the court to continue the warranty litigation as special counsel. Most of the attorney's services were performed prior to this appointment as special counsel and when the litigation was settled, an allowance of $1,500,000.00 was ordered by the Bankruptcy Court.

Two points must be noted from the District Court's opinion. First, the court noted that numerous cases have allowed fees based upon contingent fee contracts where most of the work was performed prior to the bankruptcy proceeding and that "[M]ost of these cases grounded their view upon the equitable power of the court, recognizing that the attorneys had a valid charging lien under state law." supra, at 775. The second point is that the Bankruptcy Judge had considered not only all of the "normal" factors used in determining a reasonable fee, but had used the terms of the contingent fee agreement as a guideline in fixing the fee. The District Court held this was not improper since the Bankruptcy Judge "...did not regard himself as bound by the percentage of the compensation therein contained." supra, at 775.

Pursuant to Sections 311 and 312 of the Bankruptcy Act, the Bankruptcy Court has paramount and exclusive jurisdiction over all property of the debtor upon filing of the petition. Once this jurisdiction attaches, control of administration of the estate cannot be surrendered even by the court itself, *Gross v. Irving Trust Co.*, 289 U.S. 342, 53 S.Ct. 605, 77 L.Ed. 1243 (1933), although the bankruptcy court may allow third party interests to be adjudicated elsewhere when it is convenient to do so. *Sherman v. Buckley*, 119 F.2d 280 (2d Cir., 1941). This property of the estate may be an unpaid judgment from a nonbankruptcy court. *Matter of Land Investors*, 544 F.2d 925 (7th Cir., 1976).

Although there have been cases which have held that the bankruptcy court may not determine the extent to which an attorney charging lien applies to a judgment, the Seventh Circuit Court of Appeals has stated in *Matter of Land Investors*, supra, at 933:

> "Our holding that the bankruptcy court had summary jurisdiction of the judgment proceeds necessarily in this case includes the corollary that it could determine the validity and extent of encumbrances thereto."

The Bankruptcy Court, then, clearly has jurisdiction to determine the validity of an extent of applicant Maley's attorney lien. The next question, then, is what is the extent of applicant Maley's attorney lien?

Applicant Maley's lien is based upon an Indiana statute, Ind. Code §33-1-3-1, which provides:

> "Lien of attorney.—Any attorney practicing his profession in any court of record in this state, shall be entitled to hold a lien, for his fees, on any judgment rendered in favor of any person or persons employing such attorney, within sixty [60] days from the time such judgment shall have been rendered, enter in writing upon the docket or record wherein the judgment is recorded, his intention to hold a lien thereon, together with the amount of his claim, and if an appeal is taken on such judgment, such lien may be entered within sixty [60] days from the date the opinion of the higher court is recorded in the office of the clerk of the trial court or from the date of final judgment where the cause is reversed and retried."

The purpose of this statute and other similar statutes in other jurisdictions is to protect and secure an attorney's compensation for services he has performed. 3 I.L.E., Attorney and Client §61. However, the mere filing of an intent to hold an attorney's lien on a judgment does not determine the existence of same and does not assume to fix the amount due. *State of Indiana ex rel Mock v. Blecke*, 71 Ind.App. 23, 116 N.E. 2 (1917). Therefore, the lien claimed

by applicant Maley, under Indiana law, is a claim against the judgment and the amount of that claim is a matter of judicial determination. Whether the amount of Maley's fee is computed strictly on the basis of his contingent fee agreement with the debtor or whether the fee is determined by the Court, the purpose of the Indiana attorney lien statute will be fulfilled, because in either case, Maley's fee is an expense of administration and, as such, will be paid first from the judgment proceeds.

If the fee of applicant Maley is to be determined pursuant to his contingent fee contract, several determinations must be made. Contracts are generally construed and given effect in accordance with the law of the state wherein performance is to take place. *Peresiples v. Elgin, Joliet & Eastern Railway Company*, 231 F.2d 268 (7th Cir., 1956). The Maley-Innkeepers contract was made and performed in Indiana, and as a result, the law of Indiana would normally apply in determining the validity of the contract.

In Indiana, contingent fee agreements are valid if fairly made, however, because of possible abuses, courts must carefully scrutinize these agreements. *Draper v. Zebec*, 219 Ind. 362, 37 N.E.2d 952 (1941). In addition, any agreement entered into by an attorney and his client with respect to compensation during the existence of a confidential relationship, though not void, is presumptively invalid and the burden is upon the attorney to show that the agreement is a fair one and that the compensation provided for does not exceed fair and reasonable remuneration for the services performed. *French v. Cunningham*, 149 Ind. 632, 49 N.E. 797 (1898).

There has been no evidence in this case that applicant Maley's 50% contingent fee contract was unfair or did take undue advantage of his client. Applicant Maley had already made a similar agreement with the President of the debtor corporation, Andrew Tabor, individually, for similar litigation. Innkeepers of New Castle was also,

apparently, unable and unwilling to compensate Maley on an hourly basis. The evidence also showed that this contract is a normal type of arrangement for fees in condemnation proceedings, expecially when the chances for a substantial recovery are not great. Therefore, it appears that the contingent fee agreement was a fair one under the circumstances based upon the standards provided by Indiana law.

It does not appear, however, that the amount requested by applicant Maley for his fee is completely substantiated by that agreement. The contract between applicant Maley and Innkeepers of New Castle, Inc. was reduced to writing by the parties on January 5, 1976 and provides in part:

> "It is agreed that Attorneys are to be paid a sum equal to fifty percent [50%] of that sum which is the difference between the amount of judgments finally entered in said causes, whether as a result of trial, settlement, stipulation, agreement or otherwise, and the amount of the State of Indiana's final offer as evidenced by the 'Ten Day' letter, said amount of compensation to become due and payable only at such times as the amount of judgment becomes payable to the Landowners."

Judgment was entered in favor of the debtor on December 8, 1976 in the sum of $1,135,254.79, said amount including prejudgment interest of $335,254.79. Because of the appeal by the State of Indiana, no amounts were paid on the judgment until some time shortly prior to November 7, 1979 when this Court ordered that said proceeds be invested in accordance with its prior order of March 28, 1977.

In construing contracts for compensation of attorneys, courts will seek to ascertain the intent of the parties and, ordinarily, any uncertainties will be resolved in favor of the client. 7A C.J.S., Attorney and Client §§306 and 318. The contract between applicant Maley and the debtor does not appear to be vague. The contract states in part,

"...Attorneys are to be paid a sum equal to fifty percent [50%] of that sum...of the amount of judgments finally entered..." The amount of the judgment finally entered by the Circuit Court of Fayette County was $1,135,254.79 and fifty percent of that amount is $567,627.40.

Applicant Maley has also requested that he be paid fifty percent [50%] of all postjudgment interest on the condemnation award and of all interest earned on the sequestered and invested proceeds of the judgment. The fee agreement between Maley and the debtor does not mention these items, therefore, his rights to these funds must be based upon some other right that has accrued outside of the contract.

It has been said that the purpose of postjudgment interest is to compensate the judgment creditor for the fact that he has not had the use of a certain sum of money that has been adjudged to be his. *Equifax, Inc. v. Luster*, 463 F.Supp. 352 (E.D. Ark., 1978). It does not appear that in Indiana, although the rule may be different in other states, that an attorney has an ownership interest in his client's cause of action without some type of contractual authority to the contrary. Additionally, full performance on the attorney's part is a condition precedent to a right of recovery in an action on the contract. *Scobey v. Ross*, 13 Ind. 117 (1859). Although is has been held that an attorney may be entitled to a percentage of the total recovery where the total recovery is larger than the judgment entered, e.g. *In re Edgecombe Road*, 128 App.Div. 432, 112 N.Y.S. 845, affd 194 N.Y. 545, 87 N.E. 1118 (1908), and this may be a statement of the general rule, an exception exists where the attorney-client contract is such to justify a different interpretation. 7A C.J.S., Attorney and Client §320.

The contract at issue here appears fairly clear in that applicant Maley was to be paid a percentage of the judgment awarded and no more. In addition the contract states that no fee is payable to Maley until the judgment

proceeds are payable to Innkeepers of New Castle. It therefore appears that until the State of Indiana paid the judgment proceeds, no action could be maintained on the contract because all services had not been performed and because the contract stated no fee was payable until the proceeds were payable to Innkeepers. Maley therefore only had an inchoate lien on the condemnation judgment which, in the absence of contractual language to the contrary, gave him no right to the postjudgment interest, at least until the terms of the contract had been fulfilled, which event did not occur until shortly before November 7, 1979. The amount generated under this contract, however, is only evidence of what is a reasonable fee. Federal law, particularly the Bankruptcy Act, must govern the fee to which applicant Maley is entitled.

It has been noted earlier in these recommendations that the bankruptcy court has a duty to examine attorney fees that have been paid and that the court has exclusive jurisdiction to determine allowances in a bankruptcy proceeding. It has also been noted that the general rule in a bankruptcy proceeding that services rendered prior to a bankruptcy petition are normally not compensable from the estate. Various exceptions to this general rule have developed and, as was noted by the court in *Matter of Pacific Far East Line, Inc.*, 458 F.Supp. 771 (N.D. Ca., 1978), a court can compensate these services when the nature of the services is ongoing, complex and beneficial to the estate. What must be borne in mind is that the court also stated that it was not error for the referee to use a contingent fee agreement as a guideline for setting compensation *as long as he did not feel bound by it.* In other words, the amount of compensation generated by the contingent fee agreement was only evidence as to what a reasonable fee should be, not that the agreement was automatically reasonable or that it generated a reasonable fee *per se.*

Applicant Maley has asserted that under the authority of three cases, the Court is still bound by the contingent fee agreement. The first of these cases, *In re Purdence Co.*, 96 F.2d 157 (2d Circ., 1938), involved a situation where an attorney was hired by the bankrupt more than three years prior to the bankruptcy proceeding to enforce its rights under a surety bond. A judgment was obtained and then while an appeal was pending, the petition for reorganization was filed. Trustees were appointed for the debtor and they proposed that the attorney, one Davison, continue the litigation with the bankruptcy court to determine his fee. Davison refused, stood on his 25% contingent fee agreement and continued the litigation without the trustees either affirming or disaffirming his actions. As a result of the litigation, a second judgment was obtained and 25% of that judgment amounted to some $65,000.00.

The United States Second Circuit Court of Appeals, in affirming payment of that amount to Davison, noted that the trustees had several alternatives available, including a substitution of counsel. The trustees did nothing, however, and simply allowed Davison to proceed. The Court found that Davison was not appointed attorney for the trustees but performed under his contract with the debtor and, thus, was entitled to the fee generated by that contract. The Court pointed out that it did not "think" the contract could be ignored and that even so, the value of the services was equal to that amount based upon *quantum meruit*.

This case can be distinguished from the facts here. At the time the Chapter XI petition was filed on November 17, 1976, Maley was also appointed co-counsel for the debtor-in-possession and on December 6, 1976, authority to continue the condemnation proceeding was granted. This appointment was not objected to by any party nor has Maley rejected it. At the time this appointment was made, a fiduciary relationship existed between the Court and Maley and an obligation existed to advise the Court of all

connections with the debtor. *In re Arlan's Department Stores*, Inc., [1979] 21 C.B.C. 467 (2d Cir., November 5, 1979). The fact that applicant Maley did not prepare any of the pleadings or documents in the bankruptcy proceeding and that he professes no knowledge or expertise in bankruptcy law is not acceptable. *In re Arlan's Department Stores, Inc.*, supra. The burden of bringing the contingent fee agreement to the attention of the Court or refusing the appointment as counsel for the debtor-in-possession clearly rested with Maley. If he had any doubts upon "learning" of his appointment, he still should have brought the matter to the attention of the Court, especially since he testified he knew he was to be appointed co-counsel for the debtor-in-possession.

Applicant Maley has also relied upon the case of *Sherman v. Buckley*, 119 F.2d 702 (2d Cir., 1941), as being dispositive of the issue. The *Sherman* case, however, held that a state court was allowed to determine the extent of an attorney's lien and that the trustee could not later challenge that court's jurisdiction to determine that issue after allowing submission of the issue to that court. Maley also relies upon *United States v. Transocean Air Lines, Inc.*, 356 F.2d 702 (5th Cir., 1966). This case can also be distinguished from the facts here in that the determination of the extent of the attorney's charging lien on a settlement agreement in a nonbankruptcy court was binding upon a party to that litigation. The Court did not hold that either the trustee, who was not a party in the litigation, or the bankruptcy court was bound by the finding. The Court, in fact, noted that "[I]t may be appropriate at this point to say that the objection to the court's jurisdiction are not raised by the Trustee but by the Government." *United States v. Transocean Air Lines, Inc.*, supra, at 706.

Since the Court has jurisdiction over all property of the estate, including the condemnation judgment proceeds, it has jurisdiction to determine the extent of applicant

Maley's lien. The Court must also use its discretion in determining the allowances to be paid to attorneys in the Chapter XI proceeding, including those to be paid to applicant Maley.

Since applicant Maley is being compensated for all of his services in regard to the condemnation litigation, not only must such services performed subsequent to his appointment as co-counsel for the debtor-in-possession be examined, but an examination of all services performed prior to the filing of the petition must be conducted.

It has already been noted that applicant Maley's fee agreement with the debtor may be considered in determining a fee for his services but there are other factors which must also be considered. These factors are: (1) the size of the estate and the proportionate amount thereof recovered through the efforts of the attorney; (2) the time expended by the attorney in dealing with the matters involved; (3) the attorney's ability and experience; (4) the difficulty and intricacy of the legal propositions determined; (5) opinions evidenced touching upon the reasonableness of the fee requested; and (6) all of the above in light of the economical spirit of the Bankruptcy Act and total costs incurred in the administration of the estate as related to the size thereof. *Jacobowitz v. Double Seven Corporation*, 378 F.2d 405 (7th Cir., 1967).

The itemization of services rendered from April, 1969 to November 9, 1979 by Maley reflects that approximately 2,022 hours were expended on behalf of the debtor in the condemnation proceeding although he testified that the number of hours enumerated do not account for all of the time spent in rendering services for the debtor in the condemnation proceedings. The reason all hours are not accounted for is that he, as a normal practice, did not keep track of time spent in a case he had taken on a contingency fee basis until some time in the summer of 1976.

The legal services provided by Maley began in April of 1969 when he was hired by Andrew and Lucille Tabor to represent them regarding the ensuing proceedings by the State of Indiana for condemnation of Tabor lands and to represent Innkeepers of New Castle. The application of Maley, filed December 7, 1979, states that on or about April 30, 1971 Andrew Tabor, acting as President of Innkeepers of New Castle, Inc. and Robert J. Maley agreed that applicant Maley would be compensated in the same manner as in the Tabor suit and this agreement was later reduced to writing by addendum to the Tabor-Maley contract on January 5, 1976.

Applicant Maley shows that between April, 1969 and April 29, 1971, he expended 113.85 hours and that he had expenses of $177.97. He conducted all negotiations, prepared all pleadings and documents, and conducted the litigation all in connection with the trial of the condemnation proceeding. Applicant Maley also did all of the research and writing for the appeals to the Appellate and Supreme Courts of Indiana except for the securing of an affidavit from the reporter of the trial court which was secured by applicant Cordes.

Between April 30, 1971 and November 9, 1979, Maley shows approximately 1,888 hours of time according to his itemization of services. Approximately 1,234 hours of this time was spent after November 16, 1976, of which 988 hours were spent on research, pleading and trial preparation, and time spent at trial and on appeal. He has made no claim for any services provided in the Chapter XI proceeding other than those provided in connection with the condemnation proceeding.

At the present time the assets of the debtor's estate consists of approximately $1,250,000.00 in deposited funds and the value of the Holiday Inn and restaurant premises and business, which may have a sale value of some $800,000.00. As a direct result of the efforts of Maley and

included in the funds just mentioned, the sum of $1,135,254.79 came into the estate from the condemnation litigation.

Applicant Maley was well qualified to handle all of the legal matters that arose during the entire condemnation proceeding. At the present time, he has been engaged in the practice of law some 24 years and, during that time, has specialized in litigation matters. Maley also testified that since he has begun practice, that he had handled more than one hundred eminent domain proceedings. Counsel with these skills was required in the condemnation proceeding because of the intricacy and novelty of the legal questions that arose during the condemnation proceedings at the trial court level and at the Indiana Court of Appeals and the Indiana Supreme Court. These skills were best evidenced by the result obtained by applicant Maley in securing a favorable decision at trial and on appeal.

Much time and effort have been devoted by applicant Maley to this cause over a period of some ten years. When Maley was retained by the debtor to pursue the debtor's rights, the probabilities for the success ultimately gained were very slight. The legal questions and maneuvering encountered were successfully overcome and, as a result, not only was new law made in Indiana but the assets of the estate of the debtor were greatly increased.

The amount requested by Maley as his fee for all of the above services is $668,734.83 as of the date of his application plus 50% of the interest on the condemnation proceeds invested under this Court's authority. It should be noted that at the hearing on Applications for Allowances and Reimbursement of Expenses held on December 14, 1979 that applicant Maley, by oral motion, amended his Application for Attorney Fees, which motion was sustained by order of the Court by entry dated December 19, 1979, to provide that "...the total amount of attorney fees as requested by Robert J. Maley be reduced by that amount

over and above fifty percent (50%) of the proceeds of the judgment as set forth in the aforesaid application of Robert J. Maley in the event the combined total of the fees allowed to Robert J. Maley and Jim C. Cordes as requested exceeds fifty percent (50%) of said judgment proceeds;". Maley also requests reimbursement of expenses incurred of $14,380.62 which includes the sum of $8,875.00 representing the unpaid expert witness fee of R. H. Hunnings.

APPLICATION FOR ALLOWANCES OF JIM C. CORDES AS LOCAL COUNSEL IN THE CONDEMNATION PROCEEDING

Applicant Cordes was retained as "local counsel" on behalf of Innkeepers of New Castle, Inc. in the condemnation proceeding brought by the State of Indiana when that proceeding was venued to Fayette County and first entered his appearance in that case on or about January 31, 1975.

Most of the principles relating to allowances discussed in regard to the application of Robert J. Maley are applicable to applicant Cordes with several differences. The first of which is the fact that applicant Cordes did not have a written fee agreement with the debtor. In his application, Cordes relates that he was retained on behalf of the debtor by the primary counsel in the condemnation proceeding, Robert J. Maley. In his testimony at the hearing held December 14, 1979, Cordes stated that applicant Maley had first asked him to act as local counsel but that when he was first retained, he apparently was retained for work with the Tabor cause only. Cordes further testified that after the Tabor trial, which had been separated from that of the debtor, Andrew Tabor asked that he also represent Innkeepers of New Castle, Inc. in the trial of that cause. Although no fee arrangement was ever discussed with Cordes, he assumed he would be paid the customary fee in

Fayette County for a forwarding attorney, which was one-third of the chief counsel's award. Regarding the Tabor case, it should be noted that Cordes stated that he was paid by Andrew Tabor on either a per diem or hourly basis and not a contingent fee basis.

The second fact that distinguishes applicant Cordes from applicant Maley is that Cordes was not appointed by the Court to represent the debtor-in-possession after the Chapter XI petition was filed. In fact, the services performed by Cordes essentially ended after conclusion of the trial of the condemnation proceeding, or on December 8, 1976. Cordes did not file an itemization of his time and services performed on behalf of Innkeepers of New Castle, Inc. since he kept no records, assuming he would be compensated on a contingency basis.

Cordes, in his application, related that he performed the various services performed by local counsel, including, participation in the various conferences held prior to the trial of the condemnation proceeding. He also filed the various pleadings and documents in the Fayette County Court on behalf of Innkeepers of New Castle, Inc. and did some research.

Most important of all of his services was the extensive preparatory work into a background examination of all potential jurors for the trial. Cordes also conducted the voir dire examinations and rendered valuable assistance at the trial on December 6, 7 and 8 of 1976, all of which resulted in a favorable judgment of $1,135,254.79.

After the jury had reached its verdict, the State of Indiana attempted to interplead a mortgageholder who had not been named as a party defendant. Cordes participated in the argument to the trial court to sustain the objections of the debtor to said motion which did result in a denial of the State's motion to interplead. Thereafter the State of Indiana filed its Motion to Correct Errors and

Cordes made various checks with the trial court as to its ruling on same.

The State of Indiana was successful in its motion to have a new judge appointed for a determination on the Motion to Correct Errors after the original judge failed to make a ruling on the State's motion. When the State's Motion to Correct Errors was denied, applicant Cordes secured a copy of the State's praecipe for use on appeal.

Upon appeal, Cordes lent his time and services for securing an affidavit from the reporter of the trial court which stated that the transcript of the trial proceedings had been prepared. This affidavit was secured for use in objections made to the State of Indiana's two motions to the Court of Appeals for extensions of time to file the record on appeal because the State alleged that the transcript of the trial proceedings had not yet been completed. Cordes also discussed several other problems with Maley during the appeals process and maintained close watch on the appeals process although he has made no claim for allowances for his services rendered on appeal.

Accordingly, the Court recognized that Cordes, as did Maley, perfected his attorney lien on the judgment proceeds. However, also like applicant Maley, the Bankruptcy Court must determine the extent of that lien. *Matter of Land Investors, Inc.*, 544 F.2d 925 (7th Cir., 1976). The *Land Investors*, case is even more on point with regard to applicant Cordes because there, the attorney had an agreement for a contingent fee but the precise percentage was disputed and, as a result, the Seventh Circuit Court of Appeals pointed out that "...the bankruptcy court had no real alternative to determining a reasonable contingent fee for the Oster case. It was not obliged to accept on their face appellants' conclusions as to the amount of such a fee." *Matter of Land Investors, Inc.*, supra, at 932.

The use of forwarding attorneys has been allowed in cases and the attorneys have been allowed to share

compensation. *Application of Pinetree Associates*, 77 F.Supp. 270 (E.D. N.Y., 1948). Although this sharing of compensation may be proper where the forwarding attorney actually does perform the services, there is no duty on the bankruptcy court to calculate and allow any award. *In re Hochreich*, 89 F.Supp. 414 (E.D. Y.Y., 1950). Indeed, the court may only award one reasonable attorney fee for the same work performed regardless of the number of attorneys employed, *Cle-Ware Industries, Inc. v. Sokolsky*, 493 F.2d 863 (6th Cir., 1974); cert. den. 419 U.S. 829, and duplicate attorney fees are forbidden. *In re First Colonial Corporation of America*, 544 F.2d 1291 (3rd Cir., 1977).

The amount requested by applicant Cordes as a final allowance is in the sum of $100,000.00 together with interest thereon at a rate of 8% per annum since December 8, 1976. He has made no application for reimbursement of expenses since he has no record of expenses.

ALLOWANCES AND EXPENSES RECOMMENDED

Applicant Maley's and Cordes' services may be compensated in this case as a cost of administration because they were conducting "ongoing complex litigation for the benefit of the estate" and were most successful in benefitting the estate through that litigation. The compensation awarded, however, can only be a reasonable amount for the work performed and to permit an excessive fee would be tantamount to a removal of assets from the estate to the detriment of creditors.

Your Bankruptcy Judge having reviewed the application and amended application of Robert J. Maley and the application of Jim C. Cordes, the objections to the applications, reviewed the evidence, and having examined all of the documents and schedules along with the Statement of Affairs, and having noted on the Statement of Affairs of the debtor that applicant Maley has been previously paid $2,500.00 by the debtor, and in

consideration of all of the above and foregoing, is of the opinion and recommends that a fair and reasonable allowance as final compensation is $325,000.00 as one fee for the services performed by the applicants and that the fee ordered satisfies in full the respective liens of the parties.

Because the Court did not make any arrangements for local counsel and is not obligated to calculate a separate award and since there is no itemization of services upon which to make such calculation for applicant Cordes, your Bankruptcy Judge leaves the parties who made the arrangement to determine how the one fee allowed is to be divided between them.

Your Bankruptcy Judge does recommend the reimbursement of expenses for Robert J. Maley as attorney for the debtor and debtor-in-possession of $5,505.62 and that the sum of $8,875.00 be paid to R. H. Hunnings as payment as an expert witness in the trial of the condemnation proceeding. No request for reimbursement of expenses being made by applicant Cordes, no recommendation is made.

Copies of these recommendations without exhibits are being sent to the petitioners and parties above listed contemporaneously with the filing of the same with the Clerk of this court.

Dated this 24 day of July, 1980 at Indianapolis, Indiana.

/s/ NICHOLAS W. SUFANA
NICHOLAS W. SUFANA
Bankruptcy Judge

cc: Sigmund J. Beck and Mark A. Center, Attorneys for Debtor
Robert J. Maley, Attorney for Debtor
Jim C. Cordes, Attorney for Debtor
R. M. Kroger, Attorney for Jim C. Cordes

Steven H. Ancel and Sally J. O'Connor, Attoneys for Citizens State Bank

Stephen Smith and David Powlen, Attorneys for Alexander Hamilton Life Insurance Company of America

Dennis D. Cole, Attorney for Andrew Tabor

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 10, 1982.

Before

HON. WALTER J. CUMMINGS, *Chief Judge*
HON. THOMAS E. FAIRCHILD, *Senior Circuit Judge*
HON. WILLIAM G. EAST, *Senior District Judge**

In the Matter of: INNKEEPERS OF NEW CASTLE, INC., *Debtor,*	)
No. 81-1037 vs. Appeal of ROBERT J. MALEY, *Claimant-Appellant, Cross-Appellee,*	) Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 76-B-22 JAMES E. NOLAND, *Judge.*
In the Matter of: INNKEEPERS OF NEW CASTLE, INC., *Debtor,*	)
No. 81-1109 vs. Appeal of ALEXANDER HAMILTON LIFE INSURANCE COMPANY OF AMERICA, *Cross-Appellant.*	)

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by petitioner Innkeepers of New Castle, Inc., no

*The Honorable William G. East, Senior United States District Judge for the District of Oregon, is sitting by designation.

judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES CONSTITUTION. ART. I, §8

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

UNITED STATES CONSTITUTION ART. III
ARTICLE III

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and

establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

BANKRUPTCY ACT
SECTION TWENTY-FOUR (11 U.S.C. §47 (1976))[1]

§24. Jurisdiction of Appellate Courts. a. The United States court of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: *And provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.

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[1] *See* the Petition, *supra* note 1.

BANKRUPTCY ACT
SECTION SIXTY-TWO d (11 U.S.C. §102(d)(1976))

A receiver or trustee or the attorney for any of them, or any other attorney, seeking compensation for services rendered by him in a proceeding under this Act or in connection with such proceeding, shall file with the court his petition setting forth the value and extent of the services rendered, the amount requested and what allowances, if any, have theretofore been made to him. Such petition shall be accompanied by his affidavit stating whether an agreement or understanding exists between the petitioner and any other person for a division of compensation and, if so, the nature and particulars thereof. If satisfied that the petitioner has, in any form or guise, shared or agreed to share his compensation or in the compensation of any other person contrary to the provisions of subdivision c of this section, the court shall withhold all compensation from such petitioner.

BANKRUPTCY ACT
SECTION SIXTY-SEVEN c (1) (11 U.S.C. §107(c)(1) (1976))

The following liens shall be invalid against the trustee:

(A) every statutory lien which first becomes effective upon the insolvency of the debtor, or upon distribution or liquidation of his property, or upon execution against his property levied at the instance of one other than the lienor;

(B) every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not such purchaser exists: *Provided*, That where a statutory lien is not invalid at the date of bankruptcy against the trustee under subdivision c of section 70 of this Act and is required by applicable lien law to be perfected in order to be valid against a subsequent bona fide purchaser, such a lien may nevertheless be valid

under this subdivision if perfected within the time permitted by and in accordance with the requirements of such law: *And provided further*, That if applicable lien law requires a lien valid against the trustee under section 70, subdivision c, to be perfected by the seizure of property, it shall instead be perfected as permitted by this subdivision c of section 67 by filing notice thereof with the court;

(C) every statutory lien for rent and every lien of distress for rent, whether statutory or not. A right of distress for rent which creates a security interest in property shall be deemed a lien for the purposes of this subdivision c.

BANKRUPTCY ACT
SECTION SEVENTY a (11 U.S.C. §110 (a)(1976))

§70. Title to Property. a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks, and in applications therefor: *Provided*, That in case the trustee, within thirty days after appointment and qualification, does not notify the applicant for a patent, copyright, or trade-mark of his election to prosecute the application to allowance or rejection, the bankrupt may apply to the court for an order revesting him with the title thereto, which petition shall be granted unless for cause shown by the trustee the court grants further time to the trustee for making such election; and such applicant may, in any event, at any time petition the court to be revested with such title in case the trustee shall fail to prosecute such application with reasonable diligence; and the court, upon revesting the bankrupt with such title, shall direct the

trustee to execute proper instruments of transfer to make the same effective in law and upon the records; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided*, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: *And provided further*, That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were nonassignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) property held by an assignee for the benefit of creditors appointed under an assignment

which constituted an act of bankruptcy, which property shall, for the purposes of this Act, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court.

All property, wherever located, except insofar as it is property which is held to be exempt, which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance shall vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date when it vested in the bankrupt, and shall be free and discharged from any transfer made or suffered by the bankrupt after bankruptcy.

All property, wherever located, except insofar as it is property which is held to be exempt, in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy.

The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court.

BANKRUPTCY ACT
SECTION SEVENTY b (11 U.S.C. §110(b) (1976))

The trustee shall assume or reject an executory contract, including an unexpired lease of real property, within sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later, but the court may for cause shown extend or reduce the time. Any such contract or lease not assumed or rejected within that time shall be deemed to be rejected. If a trustee is not appointed, any such contract or lease shall be deemed to be rejected within thirty days after the date of the order directing that

a trustee be not appointed. A trustee shall file, within sixty days after adjudication or within thirty days after he has qualified, whichever is later, unless the court for cause shown extends or reduces the time, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee. Unless a lease of real property expresely otherwise provides, a rejection of the lease or of any covenant therein by the trustee of the lessor does not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforceable. A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns the contract or lease to a third person, is not liable for breaches occurring after the assignment.

CHAPTER XI
ARRANGEMENTS

BANKRUPTCY ACT
SECTION 311 (11 U.S.C. §711 (1976))

Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located.

CHAPTER XI
ARRANGEMENTS

BANKRUPTCY ACT
SECTION 306 (11 U.S.C. §706 (1976))

For the purposes of this chapter, unless inconsistent with the context—

(1) "arrangement" shall mean any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms;

(2) "consideration" shall include evidences of indebtedness, either secured or unsecured, stock and certificates of beneficial interest therein, and certificates of beneficial interest in property;

(3) "debtor" shall mean a person who could become a bankrupt under section 4 of this Act and who files a petition under this chapter;

(4) "executory contracts" shall include unexpired leases of real property; and

(5) "petition" shall mean a petition filed under this chapter by a debtor proposing an arrangement.

CHAPTER XI
ARRANGEMENTS

BANKRUPTCY ACT
SECTION 313(1) (11 U.S.C. §713 (1) (1976))

Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it—

(1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate;

CHAPTER XI
ARRANGEMENTS

BANKRUPTCY ACT
SECTION 342 (11 U.S.C. §742)

Where no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all the title and exercise all the powers of a trustee appointed under this Act, subject, however, at all times to the control of the court and to such limitations, restrictions, terms, and conditions as the court may from time to time prescribe.

CHAPTER XI
ARRANGEMENTS

BANKRUPTCY ACT
SECTION 357 (11 U.S.C. §757 (1976))

An arrangement made within the meaning of this chapter may include—

(1) provisions for treatment of unsecured debts on a parity one with the other, or for the division of such debts into classes and the treatment thereof in different ways or upon different terms;

(2) provisions for the rejection of any executory contract;

(3) provisions for specific undertakings of the debtor during any period of extension provided for by the arrangement, including provisions for payments on account;

(4) provisions for the termination, under specified conditions, of any period of extension provided by the arrangement;

(5) provisions for continuation of the debtor's business with or without supervision or control by a receiver or by a committee of creditors or otherwise;

(6) provisions for payment of debts incurred after the filing of the petition and during the pendency of the arrangement, in priority over the debts affected by such arrangement;

(7) provisions for retention of jurisdiction by the court until provisions of the arrangement, after its confirmation, have been performed; and

(8) any other appropriate provisions not inconsistent with this chapter.

28 U.S.C. §1254 (1976)

§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. §2075 (1976)

Bankruptcy Rules. The Supreme Court shall have the power to prescribe by general rules, the forms or process,

writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act.

Such rules shall not abridge, enlarge, or modify any substantive rights.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at any or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rule shall be of no further force or effect after such rules have taken effect.[2]

INDIANA CODE §33-1-3-1

Lien of attorney.—Any attorney practicing his profession in any court of record in this state, shall be entitled to hold a lien, for his fees, on any judgment rendered in favor of any person or persons employing such attorney to obtain the same: Provided, That such attorney, within sixty [60] days from the time such judgment shall have been rendered, enter in writing upon the docket or record wherein the judgment is recorded, his intention to hold a lien thereon, together with the amount of his claim, and if an appeal is taken on such judgment, such lien may be entered within sixty [60] days from the date the opinion of the higher court is recorded in the office of the clerk of the trial court or from the date of final judgment where the cause is reversed and retried. [Acts 1865 (Spec. Sess.), ch. 59, §1, p. 164; 1949, ch. 52, §1, p. 155.]

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[2]The final paragraph has been deleted from the current version which appears at 28 U.S.C. §2075 (Supp. IV 1980).

RULES OF BANKRUPTCY PROCEDURE

Rule 215.
EMPLOYMENT OF ATTORNEYS AND ACCOUNTANTS

(a) Conditions of Employment of Attorneys and Accountants. No attorney or accountant for the trustee or receiver shall be employed except upon order of the court. The order shall be made only upon application of the trustee or receiver, stating the specific facts showing the necessity for such employment, the name of the attorney or accountant, the reasons for his selection, the professional services he is to render, and to the best of the applicant's knowledge all of the attorney's or accountant's connections with the bankrupt, the creditors, or any other party in interest, and their respective attorneys and accountants. If the attorney or accountant represents or holds no interest adverse to the estate in the matters upon which he is to be engaged, and his employment is in the best interest of the estate, the court may authorize his employment. Notwithstanding the foregoing sentence, the court may authorize the employment of an attorney or accountant who has been employed by the bankrupt when such employment is in the best interest of the estate. The employment of any attorney or accountant shall be only for the purposes specified in the order, but the court may authorize a general retainer of an attorney when necessity therefor is shown.

(b) Employment of Attorney or Accountant with Adverse Interest. If without disclosure any attorney or accountant employed by the trustee or receiver shall represent or hold, or shall have represented or held, any interest adverse to the estate in any matter upon which he is so employed, the court may deny the allowance of any compensation to such attorney or accountant, or the reimbursement of his expenses, or both, and may also deny any allowance to the trustee or receiver if it shall appear that he failed to make

diligent inquiry into the connections of such attorney or accountant.

(c) Employment by a General Creditor. An attorney or accountant shall not be disqualified to act as attorney or accountant for the trustee or the receiver merely because of his employment by a general creditor in the case.

(d) Employment of Attorney or Accountant on Salary. A trustee or receiver authorized to operate the business and manage the property of the bankrupt may, without specific authorization under subdivision (a) of this rule, continue or engage any attorney or accountant as a salaried employee if such employment is necessary in the operation of the business and management of the property of the bankrupt.

(e) Employment of Trustee or Receiver as Attorney or Accountant. The court may authorize the trustee or receiver to act as an attorney or accountant for the estate if such authorization is in the best interest of the estate.

(f) Services Rendered by Member or Associate of Firm of Attorneys or Accountants. If, under this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed on behalf of a professional partnership or corporation, any member or regular associate of the firm may act for the attorney or accountant so employed, without further order of the court, and his services may be compensated as services of the attorney or accountant in accordance with Rule 219.

RULES OF BANKRUPTCY PROCEDURE

Rule 219.

COMPENSATION FOR SERVICES RENDERED AND REIMBURSEMENT OF EXPENSES INCURRED IN A BANKRUPTCY CASE

(a) Application for Compensation or Reimbursement. A person seeking compensation for services, or reimbursement of necessary expenses, from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered and expenses incurred, (2) the amounts requested. An application for compensation shall include a statement by the applicant as to what payments have theretofore been made or promised to him for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation he has previously received has been shared and whether an agreement or understanding exists between the applicant and any other person for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any such sharing of compensation or agreement or understanding therefor, except that the details of any agreement by the applicant for the sharing of his compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other person on his behalf.

(b) Disclosure of Compensation Paid or Promised to Attorney for Bankrupt. Every attorney for a bankrupt, whether or not he applies for compensation, shall file with the court on or before the first date set for the first meeting of creditors, or at such other time as the court may direct, a statement setting forth the compensation paid or promised

him for the services rendered or to be rendered in connection with the case, the source of the compensation so paid or promised, and whether the attorney has shared or agreed to share such compensation with any other person. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of his compensation with a member or regular associate of his law firm shall not be required.

(c) Factors in Allowing Compensation.

(1) General. The compensation allowable by the court to a trustee, receiver, marshal, attorney, accountant, or other person entitled to compensation for services rendered in the administration of a bankrupt estate shall be reasonable, and in making allowances the court shall give due consideration to the nature, extent, and value of the services rendered as well as to the conservation of the estate and the interests of creditors.

(2) Trustee, Receiver, or Marshal. The compensation allowed by the Act to a trustee, receiver, or marshal shall be in full compensation for the services performed by him as required by the Act and by these rules, but shall not be deemed to cover expenses necessarily incurred in the performance of his duties and allowed upon the settlement of his accounts. Additional compensation may be allowed for legal or other services not required of him by the Act or by these rules, but only if such services were authorized by order of the court before they were rendered.

(3) Attorney or Accountant. Compensation may be allowed an attorney or an accountant only for professional services.

(d) Restriction on Sharing of Compensation. Except as herein provided, a person rendering services in a bankruptcy case or in connection with such a case shall not in any form or guise share or agree to share the compensation paid or allowed him from the estate for such

services with any other person, nor shall he share or agree to share in the compensation of any other person rendering services in a case under the Act or in connection with such a case. This rule does not prohibit an attorney or accountant from sharing his compensation as trustee, receiver, attorney, or accountant with a member or regular associate of his firm, or from sharing in the compensation received by his firm or by any other member or regular associate thereof, and does not prohibit an attorney for a bankrupt or for a petitioning creditor from sharing his compensation for services rendered with any other attorney contributing thereto. If a person violates this subdivision, the court may deny him compensation, may hold invalid any transaction subject to examination under Rule 220 to which he is a party, or may enter such other order as may be appropriate.

RULES OF BANKRUPTCY PROCEDURE

Rule 220.

EXAMINATION OF BANKRUPT'S TRANSACTIONS WITH HIS ATTORNEY

(a) Payment or Transfer to Attorney in Contemplation of Bankruptcy. On motion by any party in interest or on the court's own initiative, the court may examine any payment of money or any transfer of property by the bankrupt, made directly or indirectly and in contemplation of the filing of a petition by or against him, to an attorney for services rendered or to be rendered.

(b) Payment or Transfer to Attorney, or Agreement Therefor, After Bankruptcy. On motion by the bankrupt or on the court's own initiative, the court may examine any payment of money or any transfer of property, or any agreement therefor, by the bankrupt to an attorney after bankruptcy, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the bankruptcy.

(c) Invalidation of Unreasonable Payment, Transfer, or Obligation. Any payment, transfer, or obligation examined under subdivision (a) or (b) of this rule shall be held valid only to the extent of a reasonable amount as determined by the court. The amount of any excess found to have been paid or transferred under subdivision (a) or (b) may be recovered for the benefit of the estate or the bankrupt, as their interests may appear, and any obligation found to be excessive may be cancelled to the extent of the excess.

RULES OF BANKRUPTCY PROCEDURE

Rule 10—206.

EMPLOYMENT OF ATTORNEYS AND ACCOUNTANTS

(a) Conditions of Employment of Attorneys and Accountants. Bankruptcy Rule 215 applies to the employment, in Chapter X cases, of attorneys and accountants by a trustee, receiver, or debtor in possession. In addition, an attorney appointed to represent a trustee shall be disinterested as specified in Rule 10—202(c)(2). Notwithstanding the foregoing, the court may, when it is in the best interest of the estate, authorize the employment for special purposes to be set out in the order, other than to represent the trustee in conducting the case, of an attorney who is not disinterested provided that such attorney represents or holds no interest adverse to the estate in the matters upon which he is to be engaged.

(b) Employment of Attorney Not Disinterested. Any attorney who was not disinterested as required by subdivision (a) of this rule and who failed to disclose any material fact on the question of his disinterestedness may be denied the allowance of compensation or reimbursement of expenses, or both, and any allowance to the trustee may also be denied if it shall appear that he failed to make diligent inquiry into the connections of such attorney.

RULES OF BANKRUPTCY PROCEDURE

Rule 10—215.

COMPENSATION FOR SERVICES AND REIMBURSEMENT OF EXPENSES

(a) Application for Compensation and Reimbursement. A person seeking compensation from the estate for services or reimbursement of necessary expenses shall file with the court an application setting forth a detailed statement of (1) the services rendered and expenses incurred; (2) the amounts requested; and (3) the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the filing of a petition commencing a case under the Act. An application for compensation shall include a statement by the applicant as to what payments have theretofore been made or promised to him for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation he has previously received has been shared and whether an agreement or understanding exists between the applicant and any other person for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any such sharing of compensation or agreement or understanding therefor, except that the details of any agreement by the applicant for the sharing of his compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other person.

(b) Disclosure of Compensation Paid or Promised to Attorney for Debtor. Every attorney for a debtor, whether or not he applies for compensation, shall file with the court on or before the first date set for the meeting held pursuant

to Rule 10—212, or at such other time as the court may direct, a statement setting forth the compensation paid or promised him for the services rendered or to be rendered in connection with the case, the source of the compensation so paid or promised, and whether the attorney has shared or agreed to share such compensation with any other person. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of his compensation with a member or regular associate of his law firm shall not be required.

(c) Factors in Allowing Compensation and Reimbursement of Expenses.

(1) General. (A) Reasonable compensation for necessary services and reimbursement of necessary expenses incurred in a Chapter X case may be allowed by the court to the trustee, receiver, examiner, and their attorneys, the attorney for the debtor in possession, the attorney for the debtor, and such other persons as may be authorized to assist the trustee, receiver, examiner, or debtor in possession. (B) Reasonable compensation and reimbursement of expenses may be allowed by the court to creditors and stockholders, committees or representatives of creditors or stockholders, indenture trustees, depositaries, reorganization managers, and any other parties in interest, and the attorneys or agents for any of them, except the Securities and Exchange Commission, for services which are beneficial in the administration of the estate, for services which contribute to a plan which is approved or to the approval of a plan whether or not such plan is confirmed, for services which contribute to a plan which is confirmed or to the confirmation of a plan, and for services rendered in opposing a plan confirmation of which has been refused. (C) Reimbursement of expenses, including reasonable attorney's fees, incurred by the petitioning creditors may be allowed by the court.

(2) Superseded Case. If the Chapter X petition was filed

in a pending bankruptcy case or the Chapter X case was originally commenced under Chapter XI, the court may allow, if not already allowed, reasonable compensation for services rendered and reimbursement of expenses to a marshal, receiver, or trustee as allowed by the Act, to the attorney for petitioning creditors, to the attorney for the bankrupt or debtor, to the attorney for the debtor in possession, and to any other persons and their attorneys entitled to compensation under the Act or Rules in such bankruptcy or Chapter XI case.

(3) Attorney or Accountant. Compensation may be allowed an attorney or an accountant only for professional services.

(4) Denial of Allowances. No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the case in a representative or fiduciary capacity who at any time after assuming to act in such capacity has, without the approval of the court, purchased or sold claims against, or stock of, the debtor or beneficial interests direct or indirect in such claims or stock, or by whom or for whose account such claims, stock, or beneficial interests therein have been otherwise acquired or transferred.

(5) Dismissal or Conversion to Bankruptcy. On the dismissal or conversion of a case to bankruptcy pursuant to Rule 10—308, the court may allow reasonable compensation for services rendered and reimbursement of expenses incurred in the Chapter X case by any persons entitled thereto under this rule.

(d) Restriction on Sharing of Compensation. Except as herein provided, a person rendering services in a Chapter X case or in connection with such a case shall not in any form or guise share or agree to share the compensation paid or allowed him from the estate for such services with any other person, nor shall he share or agree to share in the compensation of any other person rendering services in a case under the Act or in connection with such a case. This

rule does not prohibit an attorney or accountant from sharing his compensation as a trustee, receiver, attorney, or accountant with a member or regular associate of his firm, or from sharing in the compensation received by his firm or by any other member or regular associate thereof, and does not prohibit an attorney, other than one employed pursuant to Rule 10—206, from sharing his compensation for services rendered with any other attorney contributing thereto. If a person violates this subdivision, the court may deny him compensation, may hold invalid any transaction subject to examination under Rule 10—217 to which he is a party, or may enter such order as may be appropriate.

RULES OF BANKRUPTCY PROCEDURE

Rule 10—217.

EXAMINATION OF DEBTOR'S TRANSACTIONS WITH ITS ATTORNEY

(a) Payment or Transfer to Attorney in Contemplation of the Filing of a Petition Under the Act. On motion by any party in interest or on the court's own initiative, the court may examine any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Act by or against it, to an attorney for services rendered or to be rendered.

(b) Invalidation of Unreasonable Payment or Transfer. Any payment or transfer examined under this rule shall be held valid only to the extent of a reasonable amount as determined by the court. The court may enter an order in favor of the estate in the amount of any excess found to have been paid or transferred.

RULES OF BANKRUPTCY PROCEDURE

Rule 11—11.

SCHEDULES, STATEMENT OF AFFAIRS, AND STATEMENT OF EXECUTORY CONTRACTS

(a) Schedules and Statements Required. The debtor shall file with the court schedules of all his debts and all his property, a statement of his affairs, and a statement of his executory contracts, prepared by him in the manner prescribed by Official Forms No. 11—F5 and either No. 11—F6 or No. 11—F7, whichever is appropriate. The number of copies of the schedules and statements shall correspond to the number of copies of the petition required by these rules.

(b) Time Limits. Except as otherwise provided herein, the schedules and statements, if not previously filed in a pending bankruptcy or Chapter XII case, shall be filed with the petition. A petition shall nevertheless be accepted by the clerk if accompanied by a list of all the debtor's creditors and their addresses, and the schedules and statements may be filed within 15 days thereafter in such case. On application, the court may grant up to 30 additional days for the filing of schedules and the statements; any further extension may be granted only for cause shown and on such notice as the court may direct.

(c) Partnership. If the debtor is a partnership, the general partners shall prepare and filed the schedules of the debts and property, statement of affairs, and statement of executory contracts of the partnership.

(d) Interests Acquired or Arising After Petition. Bankruptcy Rule 108(e) applies in Chapter XI cases except that the supplemental schedule need not be filed with respect to property or interests acquired after confirmation of a plan.

RULES OF BANKRUPTCY PROCEDURE

Rule 11—22.

EMPLOYMENT OF ATTORNEYS AND ACCOUNTANTS

Bankruptcy Rule 215 applies in Chapter XI cases to the employment of attorneys and accountants for a trustee, receiver, debtor in possession, or creditors' committee selected pursuant to Rule 11—27.

RULES OF BANKRUPTCY PROCEDURE

Rule 11—31.

COMPENSATION FOR SERVICES AND REIMBURSEMENT OF EXPENSES

Bankruptcy Rule 219 applies in Chapter XI cases. Reasonable compensation for services beneficial to the estate and reimbursement of necessary expenses may be allowed to the attorney for the debtor and debtor in possession whether or not a plan is confirmed.

RULES OF BANKRUPTCY PROCEDURE

Rule 11—32.

EXAMINATION OF DEBTOR'S TRANSACTIONS WITH HIS ATTORNEY

Bankruptcy Rule 220 applies in Chapter XI cases.